

THE FORGOTTEN FREEDOM OF ASSEMBLY

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A dissertation submitted to the faculty of the University of North Carolina at Chapel Hill
in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the
Department of Political Science.

Chapel Hill
2009

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ABSTRACT

JOHN INAZU: The Forgotten Freedom of Assembly
(Under the direction of Jeff Spinner-Halev)

The freedom of assembly has been at the heart of some of the most important social movements in American history: Antebellum abolitionism, women's suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive era and the New Deal, and the Civil Rights movement. But in the past thirty years, assembly has become little more than an historical footnote in American political theory and law. At least part of the reason for its loss is attributable to the judicially recognized right of association that emerged in the middle of the twentieth century. After tracing the histories of assembly and association and the political, jurisprudential, and theoretical factors that shaped the modern right of association, I argue that the shift from assembly to association undermines the principle of group autonomy for at least three reasons: (1) associations acceptable to a national consensus replace dissenting assemblies; (2) the public assembly becomes the private and depoliticized association; and (3) the assembly as form of expression becomes the association as means of expression. I offer a legal and theoretical roadmap for a return to assembly that can reclaim some of the autonomy for groups that has been sacrificed by the freedom of association. I also suggest how some religious groups might discover greater theoretical and theological resources in assembly.

ACKNOWLEDGMENTS

The idea for this dissertation came when I was working as a law clerk prior to graduate school. A research issue brought me to the text of the First Amendment, and as I stared down at it on my desk, I noticed the words “the right of the people peaceably to assemble.” In three years of law school and four years of legal practice, I had never *thought* of the right of assembly, let alone seen it applied in constitutional law. But I was immediately struck by the legal and theological possibilities of the language of peaceable assembly.

After some initial research, I discovered that little had been written about the right of assembly, and that courts had paid almost no attention to it in recent years. I also found that the right of association that came into existence in the late 1950s had produced remarkably little theoretical commentary. Liberal and contemporary political thought has given substantial attention to the concept of free association generally, but the theoretical basis for the constitutional right of association garnered little notice until the Supreme Court redefined the contours of that right in the 1980s. I suspected that there was a great deal that could be told about both the disappearance of assembly and the emergence of association. This dissertation begins that effort.

I have been blessed with an excellent and generous committee in Jeff Spinner-Halev, Mike Lienesch, Susan Bickford, Stanley Hauerwas, and Jeff Powell. Jeff Spinner-Halev has been an ideal director, encouraging me in my progress and jumping in at just the right moments. Mike and Susan have been careful and patient readers and provided

gracious feedback, and Mike has been doing so since my first attempts to articulate some of these ideas in his classes on classical, modern, and American political theory. Stanley has shaped much of how I have come to see assembly through his own work and by exposing me to Wittgenstein, MacIntyre, and Yoder (the sparse references to these names throughout the dissertation should not be mistaken for their lack of influence). Jeff Powell has been an important mentor since my days as a law student at Duke; no one has been more influential to my training and development as a lawyer and a scholar.

I am grateful for advice and comments from Gerald Postema, Jim Skillen, Kristen Johnson (sorry for getting you lost in Durham), and Nancy Rosenblum. Thanks also to the political theory graduate students at Harvard University for organizing a conference at which I presented an early version of some of these ideas, to the staff at the libraries at the University of North Carolina and Syracuse University, and to Dr. and Mrs. Thomas S. Royster for their generous financial support of my graduate work at the University of North Carolina through the Royster Fellowship.

I am indebted to a number of friends who have offered thoughts and critiques along the way: Ryan Messmore, Nathan Chapman, Seth Dowland, and Amin Aminfar. I owe a particular debt of gratitude to Amin for his thoughtful challenges and insights over a number of years. Scott Davis, Tod Laursen, Richard Schmalbeck, Scott Silliman, Joel Fleishman, Mike Broadway, and Curtis Freeman encouraged me in important ways at earlier stages of my academic training.

To the people at Blacknall Memorial Presbyterian Church, and especially those I know through Blacknall's youth ministry, thank you for modeling some of what I am

trying to envision with the idea of assembly. And to Allan Poole, thanks for your leadership, mentorship, and friendship over the past fifteen years.

To my parents, Willie and Sandy Inazu, thank you for all that you have done for me. Thanks to Caroline's parents, Skip and Melissa Young for your presence in our lives (and free childcare). To Caroline, thanks for putting up with my ideas, distractions, and quirky sense of humor. And to Lauren, you'll probably never read this, and that's okay—we can stick with that crazy duck book with no plot.

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Introduction

The freedom of assembly has been at the heart of some of the most important social movements in American history: Antebellum abolitionism, women's suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive era and the New Deal, and the Civil Rights movement. Claims of assembly stood against the ideological tyranny that exploded during the first Red Scare in the years surrounding World War I and the second Red Scare of 1950s' McCarthyism. Abraham Lincoln once called "the right of the people peaceably to assemble" part of "the Constitutional substitute for revolution."¹ In 1939, the popular press heralded assembly as one of the "four freedoms" at the core of the Bill of Rights. Even as late as 1973, John Rawls characterized it as one of the "basic liberties."² But in the past thirty years, the freedom of assembly has become little more than an historical footnote in American political theory and law. Why has assembly so utterly disappeared from our democratic fabric?

One might, with good reason, contend that the right of assembly has been subsumed into the rights of speech and association and that these rights adequately protect the people gathered. On this account, contemporary free speech doctrine guards the best known form of assembly—the occasional gathering of temporary duration that

¹Abraham Lincoln, *Uncollected Letters of Abraham Lincoln*, ed. Gilbert A. Tracy (New York: Houghton Mifflin Company, 1917), 127.

²John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971), 53. Rawls usually refers to association rather than assembly in his later work. See, e.g., John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 221 n.8. But see *ibid.*, 335 (mentioning assembly).

often takes the form of a protest, parade, or demonstration.³ Meanwhile, the judicially recognized right of association shelters forms of assembly that extend across time and place—groups like clubs, churches, and social organizations.

This characterization of the rights of speech and association is not implausible. Indeed, it appears to be the approach assumed by a number of contemporary political theorists.⁴ But I want to suggest that something is lost when assembly is construed as either a moment of expression (when it is viewed as speech) or an expressionless group (when it is viewed as association). Many group expressions are only fully intelligible against the lived practices that give them meaning. The rituals and liturgy of religious worship often embody deeper meaning than that which would be ascribed to them by an outside observer. The political significance of a women's pageant in the 1920s would be lost without an understanding of why these women gathered or what they were doing with the rest of their lives. And the creeds and songs recited by members of associations ranging from Alcoholics Anonymous to the Boy Scouts may reflect a way of living and system of beliefs that cannot be captured by a text or its utterance at any one event.⁵

The Supreme Court has partially recognized the connections between the meaning of expression and the form of life that embodies that expression in its category of

³*Edwards v. South Carolina*, 372 U.S. 229 (1963); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

⁴See, e.g., Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Oxford University Press, 1990); Amy Gutmann, ed., *Freedom of Association*, (Princeton, NJ: Princeton University Press, 1998); Rawls, *Political Liberalism*.

⁵The claim about intelligibility is not meant to be universal. Some people who gather in single instances of fixed duration may present a relatively coherent message absent any shared practices or history. A group of strangers that meets in front of a prison to protest an execution is one example.

expressive association.⁶ But by privileging intimate over expressive association and declaring the latter merely instrumentally valuable to other modes of communication, the Court obfuscates the critical role that a group's practices and identity play in its expression. But this is to get ahead of the story. For the Court's distinction between intimate and expressive association is but itself a reconfiguration of a right of association that already marked a significant shift in the constitutional framework for protecting group autonomy. The original framework—and, I believe, the better one—lies in the freedom of assembly.

A. THE DIFFERENCES BETWEEN ASSEMBLY AND ASSOCIATION

The differences between assembly and association are more than semantic. The shift in the constitutional framework brought with it three changes: (1) dissenting and destabilizing groups protected by the right of assembly were displaced by a right of association bounded by a national consensus; (2) practices that constituted public life in the context of the right of assembly were depoliticized and privatized by a right of association that developed contemporaneously with a dispersion of public power and a narrowing of the scope of what comprised the political; and (3) assemblies that were forms of expression were replaced by associations that were merely means of expression.⁷ In other words, with association came the loss of the dissenting, public, and expressive assembly.

⁶See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

⁷Cf. Ken I. Kersch, "'Guilty By Association' and the Postwar Civil Libertarians," *Social Philosophy and Policy* 25 (2008): 55 (the right of association is "commonly considered as an instrument for vindicating high-status (First Amendment) rights claims, like freedom of religion and freedom of speech, which, as first-order rights, are defended not

The constitutional right of association underwrites a political theory whose espoused tolerance ends with groups that challenge its fundamental assumptions. This weakened understanding of group autonomy opens the door for the liberal state to demand what Nancy Rosenblum has called a “logic of congruence” requiring “that the internal life and organization of associations mirror liberal democratic principles and practices.”⁸ William Galston intimates that such a result undermines liberalism itself: “[l]iberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value.”⁹

We do not live under Galston’s “rebuttable presumption.” If we did, we might hear more about polygamist Mormons, communist schoolteachers, all-male Jaycees, peyote smoking Native Americans, and even racist homeowners. And while today’s cultural and legal climate raises the most serious challenges to practices at odds with liberal democratic values, the eclectic collection of groups that have at one time or another been silenced and stilled in the absence of a meaningful right of assembly cuts across political and ideological boundaries. I believe that the broad appeal of assembly to these groups of markedly different ideologies makes it a better “fit” than association

as instruments indispensable to the exercise of other rights but rather on their own substantive terms”).

⁸Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton: Princeton University Press, 1998), 36.

⁹William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002), 3.

within the context of our nation’s legal and political heritage.¹⁰ But recognizing this fit requires knowing the story of the right of assembly.

Learning an unfamiliar story is never easy, least of all in constitutional law. The freedom of association is now firmly entrenched in our legal and political vernacular—by way of example, at least twenty-five federal district and appellate court opinions have referred to a nonexistent “freedom of association clause” in the United States Constitution. In this context, it takes effort to envision a different understanding of the relationship between groups and the state. Accordingly, part of my task is to cast a vision that requires creative engagement with regnant legal doctrine and political theory, particularly that espoused by the Supreme Court and its commentators over the past half-century. But this is a task worth doing. Constitutional language—and the ways in which we use it or ignore it—matters to the views we form about the law. Dismissing the right of assembly as an archaic concept that has little relevance to contemporary discussions about group autonomy ignores part of our democratic fabric and forgets those who have insisted on the alternative kinds of political life that have existed in the shadow of the state.

B. THE RIGHT PEACEABLY TO ASSEMBLE

Although there has been some debate as to whether “the right of the people peaceably to assemble, and to petition the government for a redress of grievances”

¹⁰By “fit,” I mean to suggest the coherence to an ongoing tradition and social practice intimated in different ways by both Ronald Dworkin and Alasdair MacIntyre. See Ronald M. Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986). Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981).

recognizes a single right to assemble for the purpose of petitioning the government or establishes both an unencumbered right of assembly and a separate right of petition, I will show that the Framers of the First Amendment understood assembly to encompass more than petition. The first groups to invoke the freedom of assembly also construed it broadly. At the end of the eighteenth century, the Democratic-Republican Societies emerging out of the increasingly partisan divide between Federalists and Republicans “invariably claimed the right of citizens to assemble.”¹¹ During the antebellum era, policymakers in southern states recognized the significance of free assembly to public opinion and routinely prohibited its exercise among slaves and free blacks. Meanwhile, female abolitionists and suffragists in the North organized their efforts around a particular form of assembly, the convention.

Although courts and commentators lost sight of this lived history (due at least in part to a misreading of the text of the First Amendment’s assembly clause), the people claiming the right to assemble insisted on a richer meaning. During the Progressive era, three political movements evidenced this more robust sense of assembly: a revitalized women’s movement, a surge in political activity among African-Americans, and an increasingly agitated labor movement. The groups underlying these movements insisted that their public gatherings were no less political than the institutional structures they criticized. Their gatherings included parades, pageants, and demonstrations, but also a new form of collective action, the labor strike.

¹¹Philip S. Foner, *The Democratic-Republican Societies, 1790-1800 (A Documentary Sourcebook)* (Westport: Greenwood Press, 1976), 11.

In 1937, the Supreme Court made assembly applicable to state action in *De Jonge v. Oregon*.¹² The right of assembly gained traction in cases like *Herndon v. Lowry*¹³ and *Hague v. Committee for Industrial Organization*,¹⁴ and it became one of the core democratic freedoms heralded in popular discourse. But this recognition of assembly proved evanescent. The Court failed to develop a coherent doctrinal approach, and cases involving the rights of “speech and assembly” routinely resolved the latter within the framework of the former. Although principles of assembly remained important in several cases overturning convictions of African-Americans who participated in peaceful civil rights demonstrations in the 1960s, the courts resolved most cases involving group autonomy without considering the right of assembly. The Court, in fact, has not addressed an assembly claim in the last twenty years.

C. THE RIGHT OF ASSOCIATION IN THE NATIONAL SECURITY ERA

At the same time that assembly began falling out of political and legal discourse, the Court shifted its constitutional focus to a new concept: association. The development of constitutional association—and with it, the disappearance of assembly—in many ways depended upon surrounding contexts. I divide these contexts into two eras. The first, which I call the national security era, began in the late 1940s and lasted until the early 1960s. It formed the background for the initial recognition of the right of association in

¹²*De Jonge v. Oregon*, 299 U.S. 353 (1937).

¹³*Herndon v. Lowry*, 301 U.S. 242, 258 (1937).

¹⁴*Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939).

NAACP v. Alabama.¹⁵ The second, which I call the equality era, spanned from the early 1960s to the end of the twentieth century and included an important reinterpretation of the right of association in *Roberts v. United States Jaycees*.¹⁶

The right of association first emerged in the national security era. During this time, three factors influenced its shaping: (1) the conflation of rampant anti-communist sentiment with the rise of the civil rights movement (a political factor); (2) infighting on the Court over the proper way to ground the right of association in the Constitution and the relationship between association and assembly (a jurisprudential factor); and (3) the pluralist political theory of mid-twentieth century liberalism that emphasized the importance of consensus, balance, and stability (a theoretical factor).

The primary political factor that influenced the right of association was the historical coincidence of the Second Red Scare and the Civil Rights movement. From the late 1940s to the early 1960s, the government's response to the communist threat pitted national security interests against group autonomy. These tensions were mimicked (albeit somewhat artificially) in the South when segregationists analogized the unrest stirred by the NAACP to the threats posed by communist organizations; segregationists even charged that communist influences had infiltrated the NAACP itself. The Supreme Court responded unevenly, suppressing communist organizations in the name of order and stability but extending broad protections to civil rights groups.

The jurisprudential factor shaping the right of association involved disagreement on the Court over its constitutional source. The issue was most evident when the Court

¹⁵*NAACP v. Alabama*, 357 U.S. 449 (1958).

¹⁶*Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

applied the right of association to limit state (as opposed to federal) law. Justices Frankfurter and Harlan argued that association constrained state action because it, like other rights, could be derived from the “liberty” of the Due Process Clause of the Fourteenth Amendment. Justices Black, Douglas, Brennan, and Warren insisted that association was located in some aspect of the First Amendment and argued that it be given the same “preferred position” as other First Amendment rights. On their view, association applied to the states because the Fourteenth Amendment had “incorporated” the provisions of the First Amendment. At times, Black and Douglas also argued that the right of association was part of the right of assembly. Although this argument received only minimal attention from the justices, it may have offered the most sensible and least complicated constitutional link for the right of association. Instead, disagreement over liberty and incorporation framed the legal discussion that in turn shaped the right of association.

The theoretical factor influencing the shaping of association was mid-twentieth century liberalism. The political and legal battles over the right of association unfolded within an already narrowed discourse that began with pluralist claims about the relationship between groups and the state. Arthur Bentley and Harold Laski advanced early versions of these claims during the first half of the twentieth century. Postwar pluralists like David Truman and Robert Dahl popularized them in the 1950s and 1960s. Two pluralist assumptions aided the embrace of the constitutional right of association: (1) the balance and stability between groups; and (2) the “liberal consensus” of American politics. Truman and Dahl supported these premises through appeals to the two great theorists of association in the American context: James Madison and Alexis de

Tocqueville. While Madison and Tocqueville held different views about the inherent characteristics of groups, both theorists implicitly recognized that the capacity for groups to maintain autonomous practices detached from and even antithetical to the will of the majority was in some ways an anti-democratic freedom. Mid-twentieth century pluralists never acquiesced in this description, assuming instead that groups maintained a harmonious existence with each other and with the state against a background of shared democratic values. Groups that diverged significantly from these values found no place in the pluralist order or the constitutional protections for association that emerged within it.

D. THE TRANSFORMATION OF ASSOCIATION IN THE EQUALITY ERA

I have called the second constitutional epoch of the right of association the equality era, which spans roughly from the mid-1960s to the end of the twentieth century. The equality era introduced its own political, jurisprudential, and theoretical factors that influenced associational freedom: (1) the pursuit of civil rights policy objectives through antidiscrimination legislation (a political factor); (2) the emergence of a constitutional right to privacy and the relationship between privacy and association (a jurisprudential factor); and (3) the prominence of Rawlsian liberalism and the academic and popular debates that unfolded within its parameters (a theoretical factor).

The primary political factor affecting the right of association in the equality era involved ongoing efforts to attain meaningful civil rights for African Americans. As the Civil Rights movement gained acceptance as part of the democratic creed, the focus of activists shifted from protecting their own associational freedom (as represented in cases

like *NAACP v. Alabama*) to challenging segregationists' "right to exclude." Questions over the limits of the right to exclude became increasingly complex when civil rights litigation moved from public to private settings.

The jurisprudential factor in the equality era involved the right to privacy. Although privacy and association had been linked in some of the Court's earliest cases on the freedom of association, new connections emerged when the Court first recognized a constitutional right to privacy in its 1965 decision, *Griswold v. Connecticut*.¹⁷ Because privacy, like association, appeared nowhere in the text of the Constitution, the Court's earlier recognition of the right of association in *NAACP v. Alabama* became an important example of the kind "penumbral" reasoning underlying *Griswold*. But there was a definitional problem with the meaning of associational privacy. In contrast to the view of privacy as the guarantor of individual autonomy that *Griswold* came to represent, privacy in the early right of association cases had more to do with protecting the boundaries of group autonomy.

The theoretical factor in the equality era was the rise of Rawlsian liberalism. Rawlsian questions about the relationship between liberty and equality and the meaning of justice dominated scholarly discussions about associational freedom. Rawlsian premises also permeated the work of legal scholars like Kenneth Karst and Ronald Dworkin. Dworkin's recognition of rights as "trumps" revealed that Rawlsian liberalism shared Madisonian and Tocquevillean concerns about majoritarianism. But unlike Madison's factions and Tocqueville's associations, the ostensibly neutral procedural devices of Rawls's public reason and Dworkin's law as integrity didn't merely counter

¹⁷*Griswold v. Connecticut*, 381 U.S. 479 (1965).

majoritarian influence. Instead, they constrained group autonomy based on the nature of a group's values and epistemology.

The influence of Rawlsian liberalism and the two lines of cases that emerged over the right to exclude and the right to privacy coalesced in *Roberts*. Justice Brennan's opinion for the Court identified two separate constitutional sources for the right of association in earlier cases. One line of decisions protected "intimate association" as "a fundamental element of personal liberty." Another set of decisions guarded "expressive association," which was "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." Intimate and expressive association created a bifurcated approach to the right of association: any group that the Court classified as an expressive association would be relegated to a lower constitutional status. Sixteen years later, the Court reaffirmed this fundamental distinction in *Boy Scouts of America v. Dale*.¹⁸

E. RECOVERING THE FREEDOM OF ASSEMBLY

The disappearance of assembly from legal and political discourse is intriguing in a country that attaches so much importance to the Bill of Rights in general and the First Amendment in particular. It may be that the principles encapsulated in the constitutional right of association embrace a broader kind of group autonomy than assembly. But I suspect otherwise. I have suggested that the loss of assembly weakens group autonomy by suppressing dissent, privatizing action, and constraining expression. These changes

¹⁸*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

are related to each other: they are all methods of control. Collectively, they open the door for the state to impose meaning, purpose, and value on groups and their activities. In other words, they deny that “the activity of rendering the world a meaningful place by generating narratives and norms requires space for groups of people gathered apart from the state and bound to come into conflict with it.”¹⁹

In my view, this limiting of group autonomy is bad for liberalism *in almost all cases* even when it results from efforts to advance other liberal values like self-respect or equality. This is because group autonomy stands as the fundamental liberal restraint against the overreaching of government into the lives and practices of its citizens. The problem with privileging values other than group autonomy is related to the communitarian insight that liberalism is incapable of enforcing content-free values. When liberalism forces a group to recognize self-respect or equality among its members, it inescapably enforces liberal conceptions of those values. Doing so replaces independent flourishing and diversity with liberalism’s own conception of the good. Group autonomy differs from other liberal principles because it operates simply as a boundary. It creates a space for a group to manifest its own form of life without seeking to structure, shape, or transform that way of life.

The right of peaceable assembly offers a constitutional framework for protecting this kind of group autonomy. In my view, this framework is divisible into two stages. The first stage asks which groups fit within the category of peaceable assembly. I propose that groups must be: (1) nongovernmental; (2) nonprofit; (3) externally

¹⁹Martha Minow, “Introduction,” in *Narrative, Violence, and the Law: The Essays of Robert Cover*, eds. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1992), 8 (describing the views of Robert Cover).

peaceable; and (4) internally peaceable. Groups that meet these threshold characteristics should be given a presumption of legitimacy and their autonomy should be upheld in almost all cases. There will, however, be rare occasions when countervailing concerns override a claim to peaceable assembly. Those instances will require a balancing of interests, but this balancing will need to proceed apart from worn notions like strict scrutiny, which are too apt to defer to standards announced in earlier cases (like *Roberts*). A strong recognition of group autonomy through the right of peaceable assembly will necessarily allow some undesirable practices to flourish. But the alternative of excessively suppressing group autonomy in the interests of liberal conformity risks endorsing the hegemonic tendencies of the state about which liberalism portends.

F. THEORIZING RELIGIOUS ASSEMBLY

At one point in our constitutional history, religious groups received protection from state interference under the free exercise clause of the First Amendment. But the traditional view that religion occupies a special place in American political thought and constitutional law has come under fire in recent years. Claims to religious freedom have increasingly been resolved under an attenuated free exercise framework or treated as analogous to speech or association claims. I briefly explore the weaknesses of these approaches and contend that the First Amendment's right of assembly offers a more robust protection for religious group autonomy. My argument for assembly is in large part theological (and more specifically, Augustinian) and assumes that religious groups seek to live out of a competing political space rather than be absorbed into the unitary political space of the nation-state.

I turn to Augustinian theology because an important premise of my argument for the dissenting, public, and expressive assembly is that meaning, purpose, and value should not be imputed to a group by the state. For this reason, an understanding of assembly must be justifiable not only from the perspective of liberal constitutionalism but also from within the particular traditions that lay claim to assembly. The kinds of arguments and modes of reasoning of those traditions may differ from those advanced by the state and may at times even challenge the state's fundamental claims to power and authority, and this kind of tradition-dependent argument finds expression in many religious groups.

Consistent with the three aspects of assembly that I have highlighted, I divide my Augustinian narrative into the dissenting, public, and expressive aspects. My first claim is that an Augustinian assembly is inherently dissenting. This is not self-evident in Augustine's writing but requires a nuanced consideration of the relationship that he posits between the earthly city and the heavenly city. While these concepts do not correspond to "church" and "state," they do provide insights into how the church both embodies a sociological form of the heavenly city and makes use of the earthly peace. Augustine objects primarily to the earthly city's orientation to earthly goods, and it is from this orientation that the church necessarily dissents.

My second claim is that an Augustinian assembly is public. Augustine's distinction between the two cities means that the church, insofar as it reflects the heavenly city, exists as its own public and political space. But Augustine is even more subversive than simply insisting on a public space for the church. As Rowan Williams suggests, Augustine's argument is "designed to show that it is life outside the Christian

community which fails to be truly public, authentically political.”²⁰ For Augustine, then, the church as the sociological form of the heavenly city is the true public that is also political. Because the church as public can never be privatized or depoliticized, it will always require an accounting by the government that rules the earthly city.

My third claim is that an Augustinian assembly exists as a form of expression rather than a means of expression. The starting point for this understanding is Augustine’s understanding of sign (*signum*), thing (*res*), and sacrament (*sacramentum*). The church does not rest on foundationalist claims but instead manifests its ethics through its shared practices (sacraments) that constitute a form of life pointing toward to the heavenly city. This assembly is not merely an “expressive association” that facilitates other forms of communication; the most important aspects of its message flow out of its practices and cannot be reduced to mere words.

After sketching a theological framework for the dissenting, public, and expressive assembly, I turn to considering some of its implications in American constitutional law. My argument is that Christian practices understood in the Augustinian sense that I have described can flourish within the constitutional framework of assembly. An Augustinian conception of assembly does not provide a comprehensive solution to the problems plaguing the First Amendment’s religion clause jurisprudence. Its focus on the internal practices of groups has little to say about concerns for a return of prayer in public schools, the posting of the Ten Commandments in courtrooms, the display of nativity scenes on public property, or the inclusion of creation science in educational curricula. Nor does assembly resolve claims about wholly individualistic religious belief that has

²⁰Rowan Williams, “Politics and the Soul: A Reading of the *City of God*” *Milltown Studies* 19/20 (1987): 58.

nothing to do with the shared practices of a group. Finally, although a more nuanced concept of assembly might provide guidance for cases involving the use or denial of public funds or resources, the assembly that I have sketched here does not address those situations. It does not resolve questions of “equal access” to public property or funding. Nor does it answer questions of entitlement to unemployment benefits or tax exemptions. It may be that some or all of these matters can appeal to other aspects of the First Amendment, but they lie beyond the concern of the right of assembly.

What assembly does offer is protection for the membership, hiring, educational, and worship practices of groups. It extends beyond Augustinian Christianity to endorse the Court’s decisions permitting Mormons to terminate the employment of a building engineer not in good standing with their church²¹ and the Amish to disregard compulsory school attendance laws in the interests of protecting their children from worldly influences.²² Conversely, this kind of assembly challenges the Court’s curtailment of peaceable but unpopular activities like Mormon polygamy²³ and the use of peyote in Native American religious ceremonies.²⁴ My Augustinian conception of assembly is limited in scope and will not satisfy all religious believers. Yet it may be the case that assembly offers a possibility that is neither political liberalism nor theocratic hegemony.

²¹*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

²²*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²³*Reynolds v. United States*, 98 U.S. 145 (1878).

²⁴*Employment Division v. Smith*, 494 U.S. 872 (1990).

G. STARTING A CONVERSATION

It should be apparent by now that I believe addressing questions about group autonomy and the differences between assembly and association requires an interdisciplinary approach. The important issues surrounding the relationship of groups to the state cannot be addressed solely through a theoretical lens that forgets legal history or a doctrinal legal lens that ignores political context. Nor can theological voices be ignored in questions about religious groups or ontological claims about the state.

The greatest challenge to an interdisciplinary conversation is the same one that complicates understandings of group autonomy: the ease and frequency with which we gloss over and caricature unfamiliar ways of knowing and doing. Part of the value of interdisciplinary work is the reminder that the meaning and significance of texts and events is not exhausted by a parochial or canonical reading from a specific discipline; so too, the meaning and significance of group life cannot adequately be captured by the uncharitable or monolithic description of a court or government official. Rather, we must always keep in mind the kinds of questions that call us to the best interpretation of the words and practices we are trying to describe.²⁵ Our conversation about meaning must be dialogical and ongoing, and it requires the ability to listen as well as the ability to speak.

²⁵James Boyd White suggests four fundamental questions: (1) How is the world of nature defined and presented in the language we encounter? (2) What social universe is constituted in this discourse? (3) What are the central terms of meaning and value in this discourse, and how do they function with one another to create patterns of motive and significance? and (4) What forms and methods of reasoning are held out here as valid? James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984), 10-12.

I. The Right Peaceably to Assemble

In the pages that follow, I trace the story of the freedom of assembly. This is the right of assembly “violently wrested” from slave and free African Americans in the South and denied to abolitionist William Lloyd Garrison in the North. It is the freedom recognized in tributes to the Bill of Rights across the nation as America entered the Second World War—at the very time it was denied to 120,000 Japanese Americans. It is the right placed at the core of democracy by eminent twentieth-century Americans as diverse as Dorothy Thompson, Zechariah Chafee, Louis Brandeis, Orson Welles, and Eleanor Roosevelt.

I begin by examining the constitutional grounding of assembly in the Bill of Rights. I then explore the use of assembly in legal and political discourse in six periods of American history: (1) the closing years of the eighteenth century that brought the first test of assembly through the Democratic-Republican societies; (2) the appeals to assembly in the suffragist and abolitionist movements of the antebellum era; (3) the narrowing of the constitutional right of assembly by the Supreme Court following the Civil War; (4) the claims of assembly by suffragists, civil rights activists, and organized labor during the Progressive era; (5) the rhetorical high point of assembly between the two World Wars; and (6) the end of assembly amidst mid-twentieth century liberalism and the rise of the freedom of association.

As I recount the role of assembly in the political history of the United States, I pay particular attention to three of its characteristics. First, groups invoking the right of assembly have inherently been those that dissent from the majority and consensus

standards endorsed by government. Second, claims of assembly have always been public claims that advocate for a visible political space distinguishable from government. Finally, manifestations of assembly have always themselves been forms of expression—parades, strikes, and demonstrations, but also more creative forms of engagement like pageants, religious worship, and the sharing of meals. The groups that have gathered throughout our nation’s history display these three themes of the dissenting, public, and expressive assembly. Theirs is the story of the forgotten freedom of assembly.

A. THE CONSTITUTIONAL RIGHT OF ASSEMBLY

I begin with the text of the First Amendment, and with a textual observation. As an historical matter, we should not make too much of slight variations in wording, grammar, and punctuation in constitutional clauses.¹ There is little indication that the Framers applied our level of exegetical scrutiny to the texts that they considered and created. But because modern constitutional law sometimes parses wording more carefully, our current arguments are constrained by the precise text handed down to us. And so it is nevertheless a useful exercise to consider forensically the text that survived and the text that did not.

¹Caleb Nelson cautions against placing too much reliance on punctuation in the Constitution because at the time of the Founding “punctuation marks [were] thought to lack the legal status of words.” Caleb Nelson, “Preemption,” *Virginia Law Review* 86 (2000), 258. He notes that “[t]he ratification of the Constitution by the states reflects this relatively casual attitude toward punctuation” because many states that incorporated a copy of the Constitution in the official form of ratification varied its punctuation.” *Ibid.*, 259, n.102. Nelson cites as an example the copy of the Constitution in the Pennsylvania form of ratification, which used “different punctuation marks than the Constitution engrossed at the Federal Convention” in roughly thirty-five places. *Ibid.*

1. The Common Good

The most important aspect of the clause containing the constitutional right of assembly may be three words missing from its final formulation: *the common good*. Had antecedent versions of the assembly clause prevailed in the debates over the Bill of Rights and lawful assembly been limited to purposes serving the common good, the kinds of dissenting and disfavored groups that have sought refuge in its protections may have met with far less success. Assembly for the common good would have endorsed the consensus narrative advanced by mid-twentieth century pluralism: we tolerate groups only to the extent that they serve the national interest and thereby strengthen the stability and vitality of democracy. The Framers decided otherwise.

When the First Congress convened in 1789 to draft amendments to the Constitution, it took under consideration proposals submitted by the various states. Virginia and North Carolina proposed identical amendments covering the rights of assembly and petition:

That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.²

New York and Rhode Island offered slightly different wording, emphasizing that the people assembled for “their” common good rather than “the” common good:

That the People have a right peaceably to assemble together to consult for their common good, or to instruct their Representatives; and that every

²Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (New York: Oxford University Press, 1997), 140. This language is substantially similar to declarations in North Carolina and Pennsylvania in 1776 that “the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances.”

person has a right to Petition or apply to the Legislature for redress of Grievances.³

On June 8, 1789, Madison's proposal to the House favored the possessive pronoun over than the definite article:

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.⁴

Whether intentional or not, the recognition of the common good of the people who assemble rather than *the* common good of the state signaled that the interests of the people assembled need not align with the interests of the ruling order.

The point was not lost during the House debates. When Thomas Hartley of Pennsylvania contended that, with respect to assembly, "every thing that was not incompatible with the general good ought to be granted,"⁵ Elbridge Gerry of Massachusetts replied that if Hartley "supposed that the people had a right to consult for the common good" but "could not consult unless they met for that purpose," he was in fact "contend[ing] for nothing."⁶ In other words, if the right of assembly encompassed only the common good as understood by the state, then its use as a means of protest or dissent would be eviscerated.⁷

³Cogan, *The Complete Bill of Rights*, 129.

⁴Ibid.

⁵Congressional Register, August 15, 1789, vol. 2, quoted in Cogan, *The Complete Bill of Rights*, 145.

⁶Ibid.

⁷Cf. Melvin Rische, "Freedom of Assembly," *DePaul Law Review* 15 (1965): 337 ("Were the courts truly bound to delve into whether or not an assembly served the common good, it is likely that many assemblies that have been held to be protected by the constitution would lose this protection.").

On August 24, 1789, the House approved a version of the amendment that retained the reference to “their common good” and also incorporated the rights of speech and press:

The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed.⁸

Eleven days later, the Senate defeated a motion to strike the reference to the common good.⁹ But the following week, the text inexplicably dropped out when the Senate merged language pertaining to religion into the draft amendment.¹⁰

2. Assembly and Petition

The striking of the reference to the common good may have been intended to broaden the scope of the assembly clause, but it also introduced a textual ambiguity. Without the prepositional “for their common good” following the reference to assembly, the text now described “the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” This left ambiguous whether the amendment

⁸Ibid., 143. This version also changed the semi-colon after “common good” to a comma.

⁹*Senate Journal (1st Congress)* (September 3, 1789): 70. The following day the Senate adopted similar language: “That Congress shall make no law abridging the freedom of speech, or of the press, or the [r]ight of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.” Ibid., September 4, 1789, 71.

¹⁰“Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.” Ibid., September 9, 1789, 77. The amendment took its final form on September 24, 1789: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” Cogan, *Complete Bill of Rights*, 136.

recognized a single right to assemble for the purpose of petitioning the government or whether it established both an unencumbered right of assembly and a separate right of petition.

In one of the only recent considerations of assembly in the First Amendment, Jason Mazzone argues in favor of the former.¹¹ Mazzone suggests that:

There are two clues that we should understand assembly and petition to belong together. The first clue is the use of “and to petition,” which contrasts with the use of “or” in the remainder of the First Amendment’s language. The second clue is the use of “right,” in the singular (as in “the right of the people peaceably to assemble, and to petition”), rather than the plural “rights” (as in “the rights of the people peaceably to assemble, and to petition”). The prohibitions on Congress’ power can therefore be understood as prohibitions with respect to speech, press, and assembly in order to petition the government.¹²

Mazzone’s interpretation is problematic because the comma preceding the phrase “and to petition” appears to be residual from the earlier text that had described the “right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.”¹³ Whether left in deliberately or inadvertently,

¹¹Jason Mazzone, “Freedom’s Associations,” *Washington Law Review* 77 (2002). But see Akhil R. Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998): 26 (referring to assembly and petition as separate clauses); William W. Van Alstyne, *First Amendment: Cases and Materials* (Westbury: Foundation Press, 1995): 32 (referring to a distinct “‘peaceably to assemble’ clause”); James E. Leahy, *The First Amendment: 1791-1991: Two Hundred Years of Freedom* (Jefferson: McFarland and Co., 1991): 202 (“The final wording of the First Amendment indicates that the first Congress intended to protect the right of the people to assemble for whatever purposes and at the same time to be assured of a separate right to petition the government if they chose to do so.”).

¹²Mazzone, *Freedom’s Associations*, 712-13.

¹³Cogan, *Complete Bill of Rights*, 143. The earlier version derived in turn from Madison’s draft. *Ibid.*, 129. Mazzone recognizes that “in Madison’s draft, assembly is separated from petitioning by a semi-colon, perhaps indicating that while the right of assembly is related to the right of petition, assembly is not necessarily limited to formulating petitions.” Mazzone, *Freedom’s Associations*, 715 n.409.

the comma relates back to a distinction between a right to peaceable assembly and a right to petition.¹⁴ Moreover, at least some members of the First Congress appeared to have conceived of a broader notion of assembly, as evidenced by an exchange between Theodore Sedgwick of Massachusetts and John Page of Virginia during the House debates over the language of the Bill of Rights. Sedgwick criticized the proposed right of assembly as redundant in light of the freedom of speech:

If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae.¹⁵

Page responded that Sedgwick:

. . . supposes [the right of assembly] no more essential than whether a man has a right to wear his hat or not, but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights; if the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.¹⁶

¹⁴Mazzone addresses the comma in a footnote and argues that because it “mirrors the comma” preceding the words “or prohibit the free exercise thereof” in the first half of the First Amendment, “[i]t does not therefore signal a right of petition separate from the right of assembly.” Mazzone, *Freedom’s Associations*, 713 n.392. The argument for textual parallelism doesn’t hold because the free exercise clause explicitly refers back to “religion” (before the comma) with the word “thereof.” A closer parallel—which illustrates the problem with Mazzone’s interpretation—is the suggestion that the comma separating speech and press connotes that they embody only a singular freedom.

¹⁵Cogan, *Complete Bill of Rights*, 144.

¹⁶*Ibid.* (quoting Congressional Register, August 15, 1789, vol. 2).

Irving Brant notes that while Page's allusion to a man without a hat is lost on a contemporary audience, "[t]he mere reference to it was equivalent to half an hour of oratory" before the First Congress.¹⁷ Page was referring to the trial of William Penn.¹⁸

On August 14, 1670, Penn and other Quakers had attempted to gather for worship at their meeting-house on Gracechurch Street, London, in violation of the 1664 Conventicle Act that forbade "any Nonconformists attending a religious meeting, or assembling themselves together to the number of more than five persons in addition to members of the family, for any religious purpose not according to the rules of the Church of England."¹⁹ Prevented from entering by a company of soldiers, Penn began delivering a sermon to the Quakers assembled in the street. Penn and a fellow Quaker, William Mead, were arrested and brought to trial in a dramatic sequence of events that included a contempt of court charge stemming from their wearing of hats in the courtroom.²⁰ A jury acquitted the two men on the charge that their public worship constituted an unlawful

¹⁷Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis: Bobbs-Merrill, 1965).

¹⁸*Ibid.*, 61.

¹⁹*16 Charles II c. 4* (1664). The act was renewed in 1667 and again in 1670. William Dixon, *William Penn: An Historical Biography* (Philadelphia: Blanchard and Lea, 1851), 75, 76. In 1715, an "Act for preventing Tumults and riotous Assemblies" made it a felony if twelve or more people unlawfully assembled failed to disperse within an hour after authorities read a proclamation. George P. Smith, "The Development of the Right of Assembly: A Current Socio-Legal Investigation," *William and Mary Law Review* 9 (1967): 359, 363 n.22. This is the origin of the phrase "reading the Riot Act." *Ibid.*

²⁰Brant, *Bill of Rights* 57 (quoting Penn's journal). Penn and Mead were fined for contempt of court for wearing their hats after being ordered by an officer of the court to put them on. *Ibid.*

assembly. The case gained renown throughout England and the American colonies.²¹

Brant reports that “[e]very Quaker in America knew of the ordeal suffered by the founder of Pennsylvania and its bearing on freedom of religion, of speech, and the right of assembly” and “[e]very American lawyer with a practice in the appellate courts was familiar with it, either directly or through its connection with its still more famous aftermath.”²² According to Brant:

William Penn loomed large in American history, but even if he had never crossed the Atlantic, bringing the Quaker religion with him, Americans would have known about his ‘tumultuous assembly’ *and his hat*. Few pamphlets of the seventeenth century had more avid readers than the one entitled ‘The People’s Ancient and Just Liberties, asserted, in the Trial of William Penn and William Mead at the Old Bailey, 22 Charles II 1670, written by themselves.’ Congressman Page had known the story from boyhood, reproduced in Emlyn’s *State Trials* to which his father subscribed in 1730. It was available, both in the *State Trials* and as a pamphlet, to the numerous congressmen who had used the facilities of the City Library of Philadelphia. Madison had an account of it written by Sir John Hawles, a libertarian lawyer who became Solicitor General after the overthrow of the Stuarts in 1688.²³

Congressman Page’s allusion to Penn made clear that the right of assembly under discussion in the House encompassed more than meeting to petition for redress of grievances: Penn’s ordeal had nothing to do with petition; it was an act of religious worship. After Page spoke, the House defeated Sedgwick’s motion to strike assembly

²¹In addition to its pronouncement on the right of assembly, the case became an important precedent for the independence of juries. Following their verdict of acquittal, the trial judge had imprisoned the jurors. They were later vindicated in habeas corpus proceedings.

²²*Ibid.*, 61.

²³*Ibid.*, 56.

from the draft amendment by a “considerable majority.”²⁴ On September 24, 1789, the Senate approved the amendment in its final form, and the subsequent ratification of the Bill of Rights in 1791 enacted “the right of the people peaceably to assemble.”²⁵

The text handed down to us thus conveys a broad notion of assembly in two ways. First, it does not limit the purposes of assembly to the common good, implicitly allowing assembly for purposes that might be antithetical to the good (although constraining assembly to peaceable means). Second, it does not limit assembly to the purposes of petitioning the government. As we will see in this and later chapters, neither of these broad interpretations has been readily acknowledged in legal and political discourse. But the larger vision of assembly can be found in the practices of people who have gathered throughout American history. It is to these practices that I now turn.

B. THE FIRST TEST OF ASSEMBLY: THE DEMOCRATIC-REPUBLICAN SOCIETIES

The nascent freedom of assembly faced an early challenge when the first sustained political dissent in the new republic emerged out of the increasingly partisan divide between Federalists and Republicans. By the summer of 1792, Republican concern over the Federalist administration and its perceived support of the British in their conflict with the French had reached new levels of agitation. The Republican-leaning

²⁴Cogan, *Complete Bill of Rights*, 145 (quoting Congressional Register, August 15, 1789, vol. 2).

²⁵“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” Ibid., 136.

National Gazette began calling for the creation of voluntary “constitutional” and “political” societies to critique the Washington Administration.²⁶

The first society organized in Philadelphia in March of 1793.²⁷ Over the next three years, dozens more emerged throughout most of the major cities in the United States.²⁸ These “Democratic-Republican” societies consisted largely of farmers and laborers wary of the aristocratic leanings of Hamilton and other Federalists, but they also included lawyers, doctors, publishers, and government employees.²⁹ The largest society—the Democratic Society of Pennsylvania—boasted over 300 members.³⁰

The societies “invariably claimed the right of citizens to assemble.”³¹ A 1794 resolution from a society in Washington, North Carolina, asserted that: “It is the unalienable right of a free and independent people to assemble together in a peaceable

²⁶Robert M. Chesney, “Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic,” *University of North Carolina Law Review*, 82 (2004): 1525, 1536 n.46.

²⁷Philip S. Foner, *The Democratic-Republican Societies, 1790-1800 (A Documentary Sourcebook)* (Westport, CT: Greenwood Press, 1976): 6.

²⁸Although the exact number is disputed, there were probably around forty societies. Chesney, “Democratic-Republican Societies,” 1537 n.52.

²⁹Foner, *Democratic-Republican Societies*, 7; Chesney, “Democratic-Republican Societies,” 1538 n.54; Eugene Link, *Democratic-Republican Societies, 1790-1800* (Morningside Heights, NY: Columbia University Press, 1942): 71-74. The term “Democratic-Republican Societies” comes from historians. Chesney, “Democratic-Republican Societies,” 1527 n.5.

³⁰Foner, *Democratic-Republican Societies*, 7.

³¹*Ibid.*, 11.

manner to discuss with firmness and freedom all subjects of public concern.”³² That same year, the Boston *Independent Chronicle* declared that:

Under a Constitution which expressly provides ‘*That the people have a right in an orderly and peaceable manner to assemble and consult upon the common good,*’ there can be no necessity for an apology to the public for an Association of a number of citizens to promote and cherish the social virtues, the love of their country, and a respect for its Laws and Constitutions.³³

The societies usually met monthly, although more frequently during elections or times of political crisis.³⁴ Philip Foner reports that a large part of their activities consisted of “creating public discussions; composing, adopting, and issuing circulars, memorials, resolutions, and addresses to the people; and remonstrances to the President and the Congress—all expressing the feelings of the assembled groups on current political issues.”³⁵ In Robert Chesney’s characterization, the societies “embodied an understanding of popular sovereignty and representation in which the role of the citizen was not limited to periodic voting, but instead entailed active and constant engagement in political life.”³⁶ But in addition to meeting to discuss political issues, the societies also joined in the “extraordinarily diverse array of . . . feasts, festivals, and parades” that unfolded in the streets and public places of American cities.³⁷ These gatherings were

³²Ibid. (quoting *North-Carolina Gazette* (New Bern), April 19, 1794).

³³Ibid., 25 (quoting *Independent Chronicle* (Boston), January 16, 1794) (original emphasis). It is unclear what authority the paper is quoting—the italicized text is not from the Constitution.

³⁴Ibid., 10.

³⁵Ibid.

³⁶Chesney, “Democratic-Republican Societies,” 1539.

self-consciously public expressions. Simon Newman's study of popular celebrations of this era reminds us that:

Festive culture required both participants and an audience, and by printing and reprinting accounts of July Fourth celebrations and the like newspapers contributed to a greatly enlarged sense of audience: by the end of the 1790s those who participated in these events knew that their actions were quite likely going to be read about and interpreted by citizens far beyond the confines of their own community.³⁸

Celebrations of the French Revolution took on an especially partisan character when members and supporters of the Federalist party refused to participate in them.³⁹ Without the endorsement of the Federalist government, Republicans "were forced to foster alternative ways of validating celebrations that were often explicitly oppositional."

⁴⁰ In doing so, they characterized their tributes as representing the unified views of the entire community rather than just political elites. Newman writes that:

The result of the Democratic Republican stratagem was that members of subordinate groups—including women, the poor, and black Americans, all of who were excluded from or had strictly circumscribed roles in the white male contests over July Fourth and Washington's birthday celebrations—found a larger role for themselves in French Revolutionary celebrations than in any of the other rites and festivals of the early American republic.⁴¹

³⁷Simon P. Newman, *Parades and the Politics of the Street: Festive Culture in the Early American Republic* (Philadelphia, PA: University of Pennsylvania Press, 1997): 2. These rituals were "vital elements of political life" practiced by ordinary Americans in the early republic. Ibid., 5. While Newman cautions that some participants may have been interested only in "the festive aspects of public occasions and holidays," he writes that it was "all but impossible for these people, whatever their original motives for taking part, to avoid making public political statements by and through their participation: both their presence and their participation involve some degree of politicization and an expression of political identity and power in a public setting." Ibid., 8-9.

³⁸Newman, *Parades and the Politics of the Street*, 3.

³⁹Ibid., 120.

⁴⁰Ibid.

⁴¹Ibid., 122.

The relatively egalitarian gestures of these celebrations were not well received by Federalists, who berated the women who participated in them with sarcasm and derision and raised fears about black participation in public events.⁴²

Federalists became increasingly agitated with the growing popular appeal of the societies. The pages of the pro-Federalist *Gazette of the United States* repeatedly warned that the societies were fostering disruptive tendencies and instigating rebellion.⁴³ And while there was little basis in fact to suggest that the societies were behind the Whiskey Rebellion, the Federalist press quickly highlighted that several members of societies in western Pennsylvania had been actively involved in the insurrection.⁴⁴

Washington had been incensed by organized opposition to the whiskey tax, writing in a personal letter that while “no one denies the right of the people to meet occasionally, to petition for, or to remonstrate against, any Act of the Legislature,” nothing could be “more absurd, more arrogant, or more pernicious to the peace of Society, than for . . . a self created *permanent* body” that would pass judgment on such acts.⁴⁵ He came to believe that the widespread public condemnation of the Whiskey

⁴²Newman, *Parades and the Politics of the Street*, 128-29. It is important not to overstate these societies’ egalitarianism: their officers were “virtually without exception men of considerable substance.” Eric McKittrick and Stanley Elkins, *The Age of Federalism* (New York: Oxford University Press, 1993): 458.

⁴³Chesney, “Democratic-Republican Societies,” 1546.

⁴⁴*Ibid.*, 1557.

⁴⁵*Ibid.*, 1526 (quoting Letter from President George Washington to Burges Ball (September 25, 1794)).

Rebellion had created a political opportunity for the “annihilation” of the societies.⁴⁶

Washington took clear aim at the societies in his annual address to Congress on November 19, 1794, asserting that “associations of men” and “certain self-created societies” had fostered the violent rebellion.⁴⁷ Chesney suggests that “[t]he speech was widely understood at the time not as ordinary political criticism, but instead as a denial of the legality of organized and sustained political dissent.”⁴⁸ And Irving Brant observes that “[t]he damning epithet ‘self-created’ indorsed the current notion that ordinary people had no right to come together for political purposes.”⁴⁹

The Federalist-controlled Senate issued a quick censure of the societies following Washington’s address. The House, in contrast, entered an extended debate about the wording of its response, and assigned James Madison, Theodore Sedgwick, and Thomas Scott to draft a reply. The Federalist Sedgwick, who years earlier had suggested that the freedom of assembly was so “self-evident” and “unalienable” that its inclusion in the Constitutional amendments was unnecessary, now argued in spite of the First Amendment that the societies’ efforts to organize were effectively illegal.⁵⁰ But after four days of debate, Madison contended that a House censure would be a “severe

⁴⁶Ibid., 1559 (quoting Letter from President George Washington to Governor Henry Lee (August 26, 1794)).

⁴⁷*Annals of Congress*, Vol. 4 (1794), 788 (Statement of President George Washington).

⁴⁸Chesney, “Democratic-Republican Societies,” 1558.

⁴⁹Irving Brant, *James Madison: Father of the Constitution, 1787-1800* (Indianapolis: Bobbs-Merrill, 1950): 417.

⁵⁰Chesney, “Democratic-Republican Societies,” 1563.

punishment” and would have dire consequences for the future of free expression.⁵¹ The final language in the House response was substantially more muted than that issued by the Senate.

Following Washington’s address and the Congressional responses, “[s]pirited debates concerning the legitimacy of the societies were conducted in every community where a society existed.”⁵² Due in part to Washington’s wide popularity, public opinion turned the corner against the societies. Many of them folded within a year of the President’s speech, and by the end of the decade, all had been driven out of existence.⁵³ Yet despite their relatively short duration, the societies’ influence was not inconsequential. According to Foner, “[a]s a center of Republican agitation and propaganda . . . the societies did much to forge the sword that defeated Federalism and put Jefferson in the presidency.”⁵⁴ And as significant as these first assemblies were the heavy-handed political attacks against them. The vigorous resistance to the claims of the people assembled by those who held political power demonstrated the precarious nature of dissenting groups in the new republic.

C. ASSEMBLY IN THE ANTEBELLUM ERA

In spite of the fate of the Democratic-Republican societies, the idea that the people could assemble apart from the state continued to take hold in early American

⁵¹*Annals of Congress*, Vol. 4 (1794), 934 (Statement of Representative Madison).

⁵²Foner, *Democratic-Republican Societies*, 33.

⁵³Chesney, “Democratic-Republican Societies,” 1526.

⁵⁴Foner, *Democratic-Republican Societies*, 40.

political life. Writing in 1838, the state theorist Francis Lieber described “those many extra-constitutional, not unconstitutional, meetings, in which the citizens either unite their scattered means for the obtaining of some common end, social in general, or political in particular; or express their opinion in definite resolutions upon some important point before the people.”⁵⁵ These “public meetings” were undertaken for a variety of purposes:

[T]hey are of great importance in order to direct public attention to subjects of magnitude, to test the opinion of the community, to inform persons at a distance, for instance, representatives, or the administration, of the state of public opinion respecting certain measures, whether yet depending or adopted; to resolve upon and adopt petitions, to encourage individuals or bodies of men in arduous undertakings, requiring the moral support of well-expressed public approbation; to effect a contract and connexion with others, striving for the same ends; to disseminate knowledge by way of reports of committees; to form societies for charitable purposes or the melioration of laws or institutions; to sanction by the spontaneous expression of the opinion of the community measures not strictly agreeing with the letter of the law, but enforced by necessity; to call upon the services of individuals who otherwise would not feel warranted to appear before the public and invite its attention, or feel authorized to interfere with a subject not strictly lying within their proper sphere of action; to concert upon more or less extensive measures of public utility, and whatever else their object may be.⁵⁶

A generation later, John Alexander Jameson referred to “wholly unofficial” gatherings and “spontaneous assemblies” that were protected by the right of peaceable assembly, a “common and most invaluable provision of our constitutions, State and Federal.”⁵⁷ These assemblies were “at once the effects and the causes of social life and activity, doing for

⁵⁵Francis Lieber, *Manual of Political Ethics: Designed Chiefly for the Use of Colleges and Students of Law*, (Boston, 1838), Vol II., 467-68.

⁵⁶Ibid., 468-69. Lieber refers to “public meetings” at 471.

⁵⁷John Alexander Jameson, *A Treatise on the Principles of American Constitutional Law and Legislation: The Constitutional Convention* (Chicago, 1869 (1867)), 4, 5, 104. Jameson also refers to “spontaneous conventions” and “spontaneous assemblages.” Ibid., 4.

the state what the waves do for the sea: they prevent stagnation, the precursor of decay and death.”⁵⁸ They were “public opinion in the making,—public opinion fit to be the basis of political action, because sound and wise, and not a mere echo of party cries and platforms.”⁵⁹

Policymakers in southern states recognized the significance of free assembly to public opinion and routinely prohibited its exercise among slaves and free blacks. A 1792 Georgia law restricted slaves from assembling “on pretense of feasting.”⁶⁰ In South Carolina, an 1800 law forbade “slaves, free negroes, mulattoes, and mestizoes” from assembling for “mental instruction or religious worship.”⁶¹ An 1804 Virginia statute made any meeting of slaves at night an unlawful assembly.⁶² In 1831, the Virginia legislature declared “[a]ll meetings of free Negroes or mulattoes at any school house, church, meeting house or other place for teaching them reading or writing, either in the day or the night” to be an unlawful assembly.⁶³

The restrictions on assembly intensified following Nat Turner’s 1831 rebellion in Southampton County, Virginia. Turner’s insurrection sent Virginia and other southern

⁵⁸Ibid., 4.

⁵⁹Ibid.

⁶⁰William Goodell, *The American Slave Code* (New York: Negro Universities Press, 1968 (1853)), 329.

⁶¹Ibid., 329.

⁶²June Purcell Guild, *Black Laws of Virginia: A Summary of the Legislative Acts of Virginia Concerning Negroes from Earliest Times to the Present* (Richmond, VA: Whittet & Shepperson, 1936).

⁶³Ibid., 175-76 (citing Virginia Laws 1831, Chapter XXXIX).

states into a panic.⁶⁴ Virginia Governor John Floyd made the rebellion the central theme of his December 5, 1831, address to the legislature.⁶⁵ Floyd believed that black preachers were behind a broader conspiracy for insurrection and had acquired “great ascendancy over the minds of their fellows.”⁶⁶ He argued that these preachers had to be silenced “because, full of ignorance, they were incapable of inculcating anything but notions of the wildest superstition, thus preparing fit instruments in the hands of crafty agitators, to destroy the public tranquility.”⁶⁷ In response, the legislature strengthened Virginia’s black code by imposing additional restrictions on assembly for religious worship.⁶⁸

Concern over Turner’s rebellion also spawned additional restrictions on the assembly of slaves and free blacks in Maryland, Tennessee, Georgia, North Carolina, and Alabama.⁶⁹ By 1835, “most southern states had outlawed the right of assembly and organization by free blacks, prohibited them from holding church services without a

⁶⁴John W. Cromwell, "The Aftermath of Nat Turner's Insurrection," *The Journal of Negro History* 5, no. 2 (1920): 208-34.

⁶⁵*Ibid.*, 218, 223.

⁶⁶*Ibid.*, 218.

⁶⁷*Ibid.*, 219 (quoting *The Journal of the House of Delegates* (1831) 9, 10).

⁶⁸*Ibid.*, 230. See Guild, *Black Laws of Virginia*, 106-07 (“no slave, free Negro or mulatto shall preach, or hold any meeting for religious purposes either day or night.”). In 1848, Chapter 120 of the Criminal Code decreed that: “It is an unlawful assembly of slaves, free Negroes or mulattoes for the purpose of religious worship when such worship is conducted by a slave, free Negro, or mulatto, and every such assembly for the purpose of instruction in reading and writing, by whomsoever conducted, and every such assembly in the night time, under whatsoever pretext.” *Ibid.*, 178-79. The law also stated that “[a]ny white person assembly with slaves or free Negroes for purpose of instructing them to read or write, or associating with them in any unlawful assembly, shall be confined in jail not exceeding six months and fined not exceeding \$100.00.” *Ibid.*, 179.

⁶⁹Cromwell, "The Aftermath of Nat Turner's Insurrection," 231-33.

white clergyman present, required their adherence to slave curfews, and minimized their contact with slaves.”⁷⁰ In 1836, Theodore Dwight Weld aptly referred to the oppressive restrictions on blacks as “‘the right of peaceably assembling’ violently wrested.”⁷¹

The importance of assembly to religious worship and the felt impact of its loss is captured in the words of James Smith, the Methodist minister whose 1881 narrative detailed his experiences as a slave in Virginia:

The way in which we worshiped is almost indescribable. The singing was accompanied by a certain ecstasy of motion, clapping of hands, tossing of heads, which would continue without cessation about half an hour; one would lead off in a kind of recitative style, others joining in the chorus. The old house partook of the ecstasy; it rang with their jubilant shouts, and shook in all its joints. . . . When Nat Turner’s insurrection broke out, the colored people were forbidden to hold meetings among themselves.⁷²

The collective restrictions on assembly did not simply silence political dissent in a narrow sense; they were rather an assault on an entire way of life, suppressing worship, education, and community among slave and free African-Americans.⁷³

⁷⁰C. Peter Ripley, *The Black Abolitionist Papers* (Chapel Hill: University of North Carolina Press, 1985): 443 n.9.

⁷¹Theodore Dwight Weld, "The Power of Congress over Slavery in the District of Columbia," reprinted in Jacobus tenBroek, *Equal Under Law* (New York: Collier Books, 1965): 271. Jacobus tenBroek describes Weld’s tract as “a restatement and synthesis of abolitionist constitutional theory as of that time.” tenBroek, *Equal Under Law*: 243. See also Harry Kalven, *The Negro and the First Amendment* (Columbus: Ohio State University Press, 1965). Akhil Amar writes that the right of assembly for religious worship was “a core right that southern states had violated.” Amar, *Bill of Rights*, 245.

⁷²Eric Foner, ed., *Nat Turner*, (Englewood Cliffs, NJ: Prentice-Hall, 1971): 74 (quoting James L. Smith, *Autobiography of James L. Smith* (Norwich, Conn. 1881: 26-30)).

⁷³ William Goodell’s 1853 book, *The American Slave Code* observed that “[r]eligious liberty is the precursor of civil and political liberty and enfranchisement.” Goodell, *The American Slave Code*, 328.

At the same time that southern states increased their efforts to suppress the freedom of assembly for African-Americans, abolitionists in the North expanded their reliance on the constitutional right. And because many abolitionists were women, freedom of assembly was “indelibly linked with the woman’s rights movement from its genesis in the abolition movement.”⁷⁴ Female abolitionists and suffragists organized their efforts around a particular form of assembly: the convention. The turn to the convention was not accidental. Between 1830 and 1860, official conventions accompanied revisions to constitutions in almost every state.⁷⁵ The focus of these official conventions on rights and freedoms provided a natural springboard for “spontaneous conventions” to criticize the blatant racial and gender inequalities perpetuated by the state constitutions.⁷⁶

Women held anti-slavery conventions in New York in 1837 and in Philadelphia in 1838 and 1839.⁷⁷ Two years after the 1848 Woman’s Rights Convention in Seneca Falls, New York, and less than a month before the official convention to revise the Ohio

⁷⁴Linda Lumsden, *Rampant Women: Suffragists and the Right of Assembly* (Knoxville: University of Tennessee Press, 1997): xxiii. Lumsden has suggested that “virtually the entire suffrage story can be told through the prism of the right of assembly.” Ibid., 144.

⁷⁵Nancy Isenberg, *Sex and Citizenship in Antebellum America* (Chapel Hill: University of North Carolina Press, 1998): 16.

⁷⁶Ibid. (quoting Jameson, *Treatise on the Principles of American Constitutional Law and Legislation*).

⁷⁷Jean Fagan Yellin and John C. Van Horne, eds. *The Abolitionist Sisterhood: Women’s Political Culture in Antebellum America* (Ithaca: Cornell University Press, 1994), ix.

constitution, a group of women assembled in Salem, Ohio, to call for equal rights for all people “without distinction of sex or color.”⁷⁸ As Nancy Isenberg describes:

[T]he Salem forum stood apart from the American political tradition. Activists used the meeting to critique politics as usual. Women occupied the floor and debated resolutions and gave speeches, while the men sat quietly in the gallery. Through a poignant reversal of gender roles, the women engaged in constitutional deliberation, and the men were relegated to the sidelines of political action.⁷⁹

In other words, the conventions conveyed the suffragist message of equality and signaled a disruption of the existing order not only in their words but in their very form of gathering.

Women’s conventions often met with harsh resistance. When Angelina and Sarah Grimké toured New England on a campaign for the American Anti Slavery Society in 1837, they were rebuked for lecturing before “promiscuous audiences.”⁸⁰ The following year, Philadelphia newspapers helped inspire a riotous disruption of the Convention of American Women Against Slavery that ended in the burning of Pennsylvania Hall.⁸¹ The participants of the 1850 Salem convention were denied the use of the local school and church.⁸² An 1853 women’s rights convention at the Broadway Tabernacle in New York degenerated into a shouting match when hecklers interrupted the speakers. Rather than criticize the disruptive crowd, the *New York Herald* sardonically characterized the

⁷⁸Isenberg, *Sex and Citizenship in Antebellum America*, 15 (quoting “To the Women of Ohio,” *Anti-Slavery Bugle*, March 30, 1850).

⁷⁹Isenberg, *Sex and Citizenship in Antebellum America*, 15.

⁸⁰*Ibid.*, 46.

⁸¹*Ibid.*

⁸²Lumsden, *Rampant Women*, xxvi.

gathering as the “Women’s Wrong Convention” and quipped that “[t]he assemblage of rampant women which convened at the Tabernacle yesterday was an interesting phase in the comic history of the nineteenth century.”⁸³ The following year, the *Sunday Times* published an editorial using racial and sexual slurs to describe the national women’s rights convention in Philadelphia.⁸⁴ Isenberg intimates that proponents of these attacks believed that “women’s unchecked freedom of assembly mocked all the restraints of civilized society.”⁸⁵

A striking example of the importance of free assembly to politically unpopular causes in the antebellum era occurred in 1835, when the Boston Female Anti-Slavery Society invited William Lloyd Garrison and the British abolitionist George Thompson to speak at its annual meeting.⁸⁶ After the Society announced that the meeting would take place at the offices of Garrison’s *Liberator*, anti-abolitionists circulated a handbill, duly printed in the *Boston Commercial Gazette*:

That infamous foreign scoundrel THOMPSON, will hold forth *this afternoon*, at the Liberator Office, No. 46 Washington street. The present is a fair opportunity for the friends of the Union to *snake Thompson out!* It will be a contest between the abolitionists and the friends of the Union. A purse of \$100 has been raised by a number of patriotic citizens to reward the individual who shall first lay violent hands on Thompson, so that he may be brought to the tar kettle before dark. Friends of the Union, be vigilant!⁸⁷

⁸³Ibid, xxvii.

⁸⁴Isenberg, *Sex and Citizenship in Antebellum America*, 46.

⁸⁵Ibid.

⁸⁶Thompson was particularly reviled by anti-abolitionists, who called him an “artful, cowardly fellow” who “always throws himself under the protection of the female portion of his audience when in danger.” *Annual Report of the Boston Female Anti-Slavery Society* (1836), 12 (quoting *Boston Commercial Gazette*).

⁸⁷Ibid., 27-28 (quoting *Boston Commercial Gazette*).

Despite the threat, the Society went forward with its meeting. A large crowd gathered and soon turned riotous. Unable to find Thompson, some of them called for Garrison's lynching. Garrison fled through a back entrance and barely escaped with his life.⁸⁸

Reflecting on the harrowing experience in the November 7, 1835 edition of *The Liberator*, Garrison lambasted the instigators of the riot in an editorial entitled "Triumph of Mobocracy in Boston":

Yes, to accommodate their selfishness, they declared that the liberty of speech, and the right to assemble in an associated capacity peaceably together, should be unlawfully and forcibly taken away from an estimable portion of the community, by the officers of our city—the humble servants of the people! Benedict Arnold's treachery to the cause of liberty and his bleeding country was no worse than this.⁸⁹

The Boston violence "became a cause célèbre among abolitionists who defended their right to free speech and assembly."⁹⁰ But fifteen years later, when Thompson returned to Boston to address the Massachusetts Anti-Slavery Society in Faneuil Hall, he was again driven away by a mob.⁹¹ Frederick Douglass referred to the latter incident as the "mobocratic violence" that had "disgraced the city of Boston."⁹² In an 1850 address delivered in Rochester, New York, Douglass decried "[t]hese violent demonstrations, these outrageous invasions of human rights" and argued that "[i]t is a significant fact, that

⁸⁸John L. Thomas, *The Liberator: William Lloyd Garrison* (Boston: Brown Little, 1963).

⁸⁹William Lloyd Garrison, *Selections from the Writings and Speeches of William Lloyd Garrison* (Boston: R.F. Wallcut, 1852), 377.

⁹⁰C. Peter Ripley, ed., *The Black Abolitionist Papers* (Chapel Hill: The University of North Carolina Press, 1991), Vo. III., 166 n.17.

⁹¹John W. Blassingame, John R. McKivigan, and Peter P. Hinks, eds. *The Frederick Douglass Papers* (New Haven: Yale University Press, 1982), Series 1, Vol. 2, 268 n.14.

⁹²*Ibid.*, 207.

while meetings for almost any purpose under heaven may be held unmolested in the city of Boston, that in the same city, a meeting cannot be peaceably held for the purpose of preaching the doctrine of the American Declaration of Independence, ‘that all men are created equal.’”⁹³

Slaves, suffragists, and abolitionists met with slanderous media coverage, blatant racial and sexual slurs, and even outright violence. Yet they persisted as dissenting, public, and expressive assemblies. These groups were political movements, to be sure, but they embodied and symbolized even larger societal and cultural challenges. As Akhil Amar has argued, the movements of the disenfranchised brought “a different lived experience” to the words of the First Amendment’s assembly clause.⁹⁴

D. ASSEMBLY IN THE RECONSTRUCTION SOUTH

The decade following the Civil War saw a proliferation of large-scale voluntary associations. Men who had met during the war formed groups like the Knights of Pythias in 1864 and the Patrons of Husbandry in 1867.⁹⁵ Women launched the Woman’s Christian Temperance Union in 1874. But in the Reconstruction South, the most significant gatherings were by secret and violent societies of white supremacists.

⁹³Ibid., 207-08.

⁹⁴Amar, *Bill of Rights*, 246.

⁹⁵Jocelyn Crowley and Theda Skocpol, “The Rush to Organize: Explaining Associational Formation in the United States, 1860s – 1920s” *American Journal of Political Science* 45 (2001): 815.

1. Assembly Perverted: White Supremacy and Violence

The Ku Klux Klan formed in late 1865 in Pulaski, Tennessee, and within five years “most white men in [the southeastern United States] either belonged to the organization or sympathized with it.”⁹⁶ Charles Lane has chronicled the violence that immediately characterized Klan activities:

In 1868, the Klan assassinated a Negro Republican congressman in Arkansas and three black Republican members of the South Carolina legislature—and in Camilla, Georgia, four hundred Klansmen, led by the sheriff, fired on a black election parade and hunted the countryside for those who fled, eventually killing or wounding more than twenty people. A Klan-led “nigger chase” in Laurens County, South Carolina, claimed thirteen lives in the fall of 1870. Thanks in part to Klan intimidation of Republican voters—white and black—Democrats had returned to power in Alabama, Virginia, Tennessee, North Carolina, and Georgia in the 1870 elections. This only seemed to encourage more Klan terror elsewhere. In January 1871, five hundred masked men attacked the Union County jail in South Carolina and lynched eight black prisoners. In March 1871, the Klan killed thirty Negroes in Meridian, Mississippi.⁹⁷

These criminal acts fell outside of the exercise of peaceable assembly, but they encountered little resistance in southern states where the rule of law itself was in question.

Responding in part to the Klan offensives, Congress passed the Enforcement Act of 1870 to federalize crimes that were going unpunished in southern jurisdictions.⁹⁸ The Act relied on the powers granted Congress under the recently enacted Fourteenth and Fifteenth Amendments. Among other things, it prohibited conspiracy “to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and

⁹⁶Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (New York: Henry Holt, 2008), 3.

⁹⁷*Ibid.*, 3-4

⁹⁸160 Stat 141 (1870).

enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.”⁹⁹ In October of 1870, the United States Attorney in Alabama indicted a number of Klansmen who had killed four and wounded fifty-four in an assault on a Republican campaign meeting in Eutaw, Alabama.¹⁰⁰ The indictment charged that the Klansmen had conspired to violate the Republicans’ First Amendment rights of speech and assembly.¹⁰¹ Defense attorneys argued that the Bill of Rights applied to the federal government, not the states, and that the Fourteenth Amendment had not altered its scope. In any case, they pointed out, the violence had been carried out by private individuals, not state officials.

In *United States v. Hall*, Fifth Circuit Judge William Woods rejected both arguments.¹⁰² He concluded that the Fourteenth Amendment had made the rights of speech and assembly applicable to the states and had authorized Congress to enforce those rights against the states. Moreover, the state need not have itself endorsed or carried out the violence because “denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.”¹⁰³ As Lane suggests, this meant that the federal government “had the power to protect freedmen not only from discriminatory state legislation but also from ‘state inaction, or

⁹⁹Ibid. (quoted in *United States v. Cruikshank*, 92 U.S. 542, 548 (1876)).

¹⁰⁰Lane, *The Day Freedom Died*, 114.

¹⁰¹Ibid.

¹⁰²*United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871).

¹⁰³Ibid., 81.

incompetency.”¹⁰⁴ Such a broad understanding of the right of assembly might have become one of the primary weapons to combat the Klan and other violent organizations set on suppressing the freedoms of black southerners.

2. *Assembly Constrained: United States v. Cruikshank*

Woods’s interpretation would not last. Its unraveling began in Grant Parish, Louisiana, one of the crucibles of white supremacist violence. By the fall of 1871, whites in the area had formed a secret society “whose purpose was to kill or expel leading Republicans and prevent blacks from voting.”¹⁰⁵ One report indicated the group had 360 members, more than half of the adult white males in the parish.¹⁰⁶ The unrest proved so unsettling that local Republican officials repeatedly requested the assistance of federal troops stationed in New Orleans.¹⁰⁷ Tensions escalated even further after Republicans challenged the results of the 1872 elections around the state.

The contested elections led to a particularly volatile situation in Grant Parish, where racist candidates claimed landslide victories despite the fact that registered black voters outnumbered whites and Republicans had won handily just two years before.¹⁰⁸ In March of 1873, Republicans snuck into the parish courthouse in Colfax and swore in their candidates to the elected positions. White supremacists from Grant and nearby

¹⁰⁴Lane, *The Day Freedom Died*, 115.

¹⁰⁵*Ibid.*, 58.

¹⁰⁶*Ibid.*

¹⁰⁷*Ibid.*, 62.

¹⁰⁸*Ibid.*, 68.

parishes converged on the courthouse, and black citizens moved in to defend it. On April 13th, Easter Sunday, the whites attacked the courthouse. After a brief skirmish, the black citizens surrendered. The white attackers then massacred dozens of their prisoners, including a number who were shot execution-style after being marched into the woods.¹⁰⁹

The federal government tried nearly one hundred white perpetrators of the Colfax Massacre for violations of the Enforcement Act. Two counts of the indictments alleged that the defendants had prevented black citizens from enjoying their “lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.”¹¹⁰ Only three defendants, William Cruikshank and two others, were convicted. On appeal, Cruikshank and his co-defendants contended that the First Amendment did not guarantee the right of assembly against infringement by private citizens. The Supreme Court agreed, concluding in *United States v. Cruikshank* that the First Amendment:

. . . assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.¹¹¹

The Court stopped short of declaring the Enforcement Act unconstitutional, but the effect of the ruling made further prosecutions practically impossible.¹¹²

¹⁰⁹See generally, *ibid.* See also Aviam Soifer, *Law and the Company We Keep* (Cambridge: Harvard University Press, 1995): 120-21.

¹¹⁰*United States v. Cruikshank*, 551.

¹¹¹*Ibid.*, 552.

¹¹²*Cf. Lane, The Day Freedom Died*, 246.

Cruikshank's primary legal conclusion was that private citizens could not be prosecuted for denying the First Amendment's freedom of assembly to other citizens.¹¹³ But the Court's dictum proved more significant than its holding. Reiterating that the First Amendment established a narrow right enforceable only against the federal government, Chief Justice Waite wrote that:

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.¹¹⁴

In context, it is evident that Waite only listed petition as an *example* of the kind of assembly that the First Amendment protected against infringement by the federal government; the Constitution also guaranteed assembly "for any thing else connected with the powers of the duties of the national government," which was as broadly as the right of assembly could be applied prior to its incorporation through the Fourteenth Amendment.¹¹⁵ But Waite's reference to "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances" came close to the text of the First Amendment. Read in isolation from the qualifying language in the rest of

¹¹³This is a relatively uncontroversial proposition today, but it had severe implications for the protection of African-Americans in southern jurisdictions where the rule of law was in peril.

¹¹⁴*Ibid.*

¹¹⁵For most of our nation's history, the provisions of the Bill of Rights have been considered enforceable only against the federal government, not against state and local government. As *Cruikshank* demonstrates, the Court construed quite literally the First Amendment's prohibition that "*Congress* shall make no law . . ." The Court began to apply the provisions of the Bill of Rights against the states following the ratification of the Fourteenth Amendment and recognized the applicability of assembly to the states in *De Jonge v. Oregon*, 299 U.S. 353 (1937). See Chapter 2 for more discussion about the applicability of the Bill of Rights to the states.

Waite's paragraph, the dictum could erroneously be construed as limiting assembly to the purpose of petition.¹¹⁶

3. *Assembly Misconstrued: Presser v. Illinois*

Ten years after *Cruikshank*, William Woods made precisely this interpretive mistake in *Presser v. Illinois*.¹¹⁷ Woods, the same judge who prior to his elevation to the Supreme Court had held the right of assembly applicable to states and private actors in *Hall*, now reversed course and concluded that *Cruikshank* had announced that the First Amendment protected the right to assemble only if “the purpose of the assembly was to petition the government for a redress of grievances.”¹¹⁸ This misreading of *Cruikshank* is the only time that the Supreme Court has expressly limited the right of assembly to the

¹¹⁶It is likely that Waite was not engaging in a careful exegesis of the assembly clause: a few paragraphs earlier, he misquoted the constitutional text by omitting the word “peaceably” and the residual comma between the phrases “to assemble” and “and to petition.”

¹¹⁷*Presser v. Illinois*, 116 U.S. 252 (1886).

¹¹⁸*Ibid.*, 267.

purpose of petition.¹¹⁹ But Woods's erroneous interpretation has been followed in decades of scholarship.¹²⁰

¹¹⁹Justice Fuller made a passing reference to "the right of the people to assemble and petition the government for a redress of grievances" in *Turner v. Williams*, 194 U.S. 279 (1904). The Court has in later cases contradicted the view that assembly and petition comprise one right. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (referring to "the rights of the people peaceably to assemble and to petition for redress of grievances" (emphasis added)); Cf. *Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (The First Amendment "has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances.").

¹²⁰In 1908, a commentator writing in *Bench and Bar* cited *Cruikshank* in support of his contention that "the right to assemble is merely incidental to the right to petition" and concluded that "the right to assemble except for the purpose of petitioning the government is not expressly guaranteed by . . . the Federal Constitution." "The Right of Assembly," *Bench and Bar* 13 (1908): 9. This incorrect reading of assembly has persisted in more recent scholarship. See Note, "Freedom of Association: Constitutional Right or Judicial Technique," *Virginia Law Review* 46 (1960): 730, 736 ("The first case to construe this provision of the first amendment construed freedom of assembly to mean the right to assemble *in order to* petition the government."); Charles E. Rice, *Freedom of Association* (New York: New York University Press, 1962): 109 (citing *Cruikshank* for the view that the language in the First Amendment "constituted the right of petition as the primary right, and the right of assembly as the ancillary right, thereby guaranteeing a right to assemble in order to petition"); Glenn Abernathy, *The Right of Assembly and Association* (Columbia: University of South Carolina Press, 1961): 152 ("It is important to note that the Cruikshank dictum *narrowed* the federal right from that of 'the right of the people peaceably to assemble and petition for a redress of grievances' to 'the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government.'" (emphasis added); Edward S. Corwin, Harold W. Chase and Craig R. Ducat, *Edwin S. Corwin's The Constitution and What it Means Today*, 14th Edition (Princeton, NJ: Princeton University Press, 1978): 332 (citing *Cruikshank* for the view that historically "the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if Amendment I read: 'the right of the people peaceably to assemble' *in order to* 'petition the government'"). Presser has also been cited for the view that the freedom of assembly is limited to the purpose of petition. See Frank Easterbrook, "Implicit and Explicit Rights of Association," *Harvard Journal of Law and Public Policy* 10 (1987): 91 (citing Presser for the view that the freedom of assembly is "the exercise by groups of the right to petition for redress of grievances").

E. ASSEMBLY IN THE PROGRESSIVE ERA

In spite of the Court's construal of assembly in *Cruikshank* and *Presser*, the people claiming the right to assemble insisted on a far broader purpose and meaning. This more robust sense of the dissenting, public, and expressive assembly is most evident in three political movements of the Progressive era: a revitalized women's movement, a surge in political activity among African-Americans, and an increasingly agitated labor movement. Here are snapshots of each.

1. Suffragists

The new women's movement began at the end of the nineteenth century, when "[h]undreds of thousands of women joined the thousands of clubs united under the auspices of the General Federation of Women's Clubs and the National Association of Colored Women."¹²¹ According to Linda Lumsden, these clubs "served as training grounds for the activist, articulate reformers who steered the suffrage movement in the 1910s."¹²² In 1908, various women's clubs began holding "open-air" campaigns to draw attention to their interests:

The success of the open-air campaigns helped prompt the organization of the first American suffrage parades, a more visible and assertive form of assembly. The spectacle of women marching shoulder to shoulder achieved many ends. One was that because of the press coverage parades attracted, suffrage became a nationwide issue. Women also acquired organizational and executive skills in the course of orchestrating extravaganzas featuring tens of thousands of marchers, floats, and bands. Better yet, parades showcased women's skills in these areas and emphasized their numbers and determination. Finally, and most crucially,

¹²¹Lumsden, *Rampant Women*, 3.

¹²²*Ibid.*, 3, 186 n.8.

marching together imbued women with a sense of solidarity that lifted the movement to the status of a crusade for many participants.¹²³

As is often the case, the growth of local assemblies corresponded with the growth of the larger institutional structures that operated on a national level.¹²⁴ The National American Woman Suffrage Association grew from 45,000 in 1907, to 100,000 in 1915, to almost two million in 1917.¹²⁵ But the core of assembly in the women's movement came through local networking and personal connections. Women's assemblies were not confined to traditional deliberative meetings but included banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes.¹²⁶ Just as the Democratic-Republican Societies had earlier refused to limit their gatherings to formal meetings, the women's movement capitalized on an expanded conception of public political life. These gatherings appealed not only to reason but also to the emotions of those before whom they assembled. As Harriot Stanton Blatch affirmed in 1912, men and women "are moved by seeing marching groups of people and by hearing music far more than by listening to the most careful argument."¹²⁷

¹²³Ibid., 146.

¹²⁴See generally, Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman: University of Oklahoma Press, 2003) (discussing the relationship between grassroots movements and larger institutional structures).

¹²⁵Lumsden, *Rampant Women*, 3.

¹²⁶Ibid., 17-19.

¹²⁷Quoted in Jennifer L. Borda, "The Woman Suffrage Parades of 1910-1913: Possibilities and Limitations of an Early Feminist Rhetorical Strategy," *Western Journal of Communication* 66 (2002): 25.

B. Civil Rights Activism

A second example of the right of assembly during the Progressive era involved political organizing among African Americans. Assertion of and resistance to this increased political mobilization led to repeated instances of mob violence, much of it carried out by white citizens unrestrained by state and federal authorities. The first decade of the twentieth century saw “savage race riots” around the country, including significant violence in Atlanta in 1906 and Springfield, Illinois in 1908.¹²⁸ Stirred by observing firsthand the carnage resulting from these riots, Mary White Ovington and others called for a conference to discuss “present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty.”¹²⁹ Sixty prominent Americans, including Jane Addams, William Lloyd Garrison, John Dewey and W.E.B. Du Bois, signed a document known as *The Call*.¹³⁰ The first National Negro Conference that resulted from *The Call* soon led to the formation of the NAACP, and a decade later, the organization had over 350 branches and 100,000 members.¹³¹ But despite the increased organizing among African Americans, racial violence grew worse. In the summer of 1917, “furious rioting” broke out in East St. Louis, leaving nine whites and forty blacks

¹²⁸James P. Roche, “Civil Liberty in the Age of Enterprise,” *University of Chicago Law Review* 31 (1963): 119.

¹²⁹Langston Hughes, *Fight For Freedom: The Story of the NAACP* (New York: Norton, 1962): 22 (quoting Oswald Garrison Villard’s “Call for a Conference”).

¹³⁰*Ibid.*

¹³¹Gilbert Jonas, *Freedom's Sword: The NAACP and the Struggle Against Racism in America, 1909-1969* (New York: Routledge, 2005): 13-15. Theodore Kornweibel, Jr., *Seeing Red: Federal Campaigns Against Black Militancy, 1919-1925* (Bloomington: Indiana University Press, 1998): 67.

dead, “many of them victims of unspeakable horror.”¹³² Two years later, hundreds died in race riots in dozens of cities, including Washington, Chicago, and Elaine, Arkansas.¹³³

Based partly on the proximity of labor unrest to racial violence, government officials linked the increasing political activity among African-Americans to the influence of communism. Theodore Kornweibel reports that J. Edgar Hoover “fixated on the belief that racial militants were seeking to break down social barriers separating blacks from whites, and that they were inspired by communists or were the pawns of communists.”¹³⁴ In a report to Congress, Attorney General A. Mitchell Palmer described “a well-concentrated movement among a certain class of Negro leaders of thought and action to constitute themselves a determined and persistent source of radical opposition to the Government” who proclaimed “an outspoken advocacy of the Bolsheviki or Soviet doctrines.”¹³⁵

Armed with these suspicions of communist influences, agents from the Bureau of Investigation carefully monitored and constrained efforts by African Americans to organize. When A. Philip Randolph and Chandler Owen, the editors of the black publication *The Messenger*, arrived to address a large crowd in Cleveland on August 4, 1918, two Bureau agents confiscated their publications and took them into custody for interrogation.¹³⁶ Undercover informants and the first black agents of the Bureau also

¹³²William M. Tuttle, Jr., *Race Riot: Chicago in the Red Summer of 1919* (Urbana: University of Illinois Press, 1996): 12.

¹³³*Ibid.*, 14, 212.

¹³⁴Kornweibel, *Seeing Red*, xii.

¹³⁵*Ibid.*, xv.

¹³⁶*Ibid.*, 77.

infiltrated local gatherings of the NAACP and other African-American organizations.¹³⁷

An agent attending a lecture by Du Bois in Toledo reported that the audience consisted of “mostly radicals.”¹³⁸ In Boston, an agent reported that Du Bois’s editorials were urging that supporters “incite riots and cause bloodshed.”¹³⁹ The Bureau also kept tabs on whites associated with the NAACP, including Jane Addams and Anita Whitney.¹⁴⁰

C. Organized Labor

The most frequent articulations of the right of assembly during the Progressive era came from an increasingly vocal labor movement. Widespread labor unrest had emerged with the increase in industrialization and immigration at the end of the nineteenth century.¹⁴¹ The “Great Strike” of 1877 had involved over 100,000 workers throughout the country and brought to a halt most of the nation’s transportation system.¹⁴² By the early 1880s, the Knights of Labor had organized hundreds of thousands of workers.¹⁴³

¹³⁷Ibid., 62, 102.

¹³⁸Ibid., 64-66.

¹³⁹Ibid., 65. According to Kornweibel, this was an “outrageously exaggerated charge.” Ibid.

¹⁴⁰Ibid.

¹⁴¹Alexis J. Anderson, “The Formative Period of First Amendment Theory, 1870-1915,” *American Journal of Legal History* 24 (1980): 58.

¹⁴²Philip Foner, *The Great Labor Uprising of 1877* (New York: Monad Press, 1977): 8, 10, 27.

¹⁴³Louis Adamic reported that by May of 1886, the Knights of Labor had surpassed one million members. Louis Adamic, *Dynamite: The Story of Class Violence in America* (New York: Viking Press, 1931): 86. Despite these numbers, the Knights of Labor were “anything but effectual” throughout their history. Ibid., 58-59, 87.

The Haymarket Riot of 1886 and the Pullman Strike of 1894 sandwiched “almost a decade of labor unrest punctuated by episodes of spectacular violence” which included “the strike of the Homestead Steel workers against the Carnegie Corporation, the miners’ strikes in the coal mining regions of the East and hardrock states in the West, a longshoremen’s strike in New Orleans that united black and white workers, and numerous railroad strikes.”¹⁴⁴ But these labor efforts remained largely unorganized, and direct appeals to the freedom of assembly did not begin in earnest until the formation of the Industrial Workers of the World in 1905.

The IWW (nicknamed the “Wobblies”) formed out of a conglomeration of labor interests dissatisfied with the reform efforts of the American Federation of Labor. Led by William Haywood, Daniel De Leon, and Eugene Debs, the Wobblies were deliberately provocative in their words and actions. The Preamble to their Constitution declared that “the working class and the employing class have nothing in common,”¹⁴⁵ and the IWW advocated this message in gatherings and demonstrations throughout the country. The freedom of assembly figured prominently in their appeals to constitutional protections.

From 1909 to 1913, the IWW organized strikes in major industries including steel, textiles, rubber, and automobiles. In 1910, Wobblies highlighted the denial of the right to assemble at a demonstration in Spokane.¹⁴⁶ When members of the IWW invoked

¹⁴⁴Richard Schneirov, Shelton Stromquist and Nick Salvatore, “Introduction,” in *The Pullman Strike and the Crisis of the 1890s*, ed. Richard Schneirov, Shelton Stromquist and Nick Salvatore (Urbana: University of Illinois Press): 4.

¹⁴⁵*Fiske v. Kansas*, 274 U.S. 380, 383 (1927) (quoting Preamble).

¹⁴⁶David M. Rabban, “The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I,” *University of Virginia Law Review* 80 (1994): 1076 n.114 (citing *Industrial Worker* (Seattle), “A Call to Action” February 26, 1910: 2).

the rights of speech and assembly during the Paterson Silk Strike of 1913, Paterson Mayor H.G. McBride responded that these rights extended to the striking silk workers but not to the Wobblies:

I cannot stand for seeing Paterson flooded with persons who have no interest in Paterson, who can only give us a bad name, who can despoil in a few hours a good name we have been years in building up, and I propose to continue my policy of locking these outside agitators up on sight.¹⁴⁷

True to his word, McBride arrested a number of IWW leaders, including Elizabeth Gurley Flynn.¹⁴⁸ Later that year, the IWW publication *Solidarity* protested that “America today has abandoned her heroic traditions of the Revolution and the War of 1812 and has turned to hoodlumism and a denial of free speech and assembly to a large and growing body of citizens.”¹⁴⁹

F. THE INTER-WAR YEARS AND THE RISE OF THE FREEDOM OF ASSEMBLY

The growing fear of communism facilitated gross incursions on the freedom of assembly across progressive movements. As Irwin Marcus has observed: “Unrest associated with the assertiveness of women, African Americans, and immigrant workers could be ascribed to the influence of the Communists and inoculating Americans with a vaccine of 100 percent Americanism was offered as a cure for national problems.”¹⁵⁰

The rising Americanism verged on claiming the freedom of assembly as one of its

¹⁴⁷*New York Times*, "Paterson Checks Weavers' Strike," February 27, 1927.

¹⁴⁸*Ibid.*

¹⁴⁹David M. Rabban, *Free Speech in its Forgotten Years* (New York: Cambridge University Press, 1997). 85 (quoting *Solidarity*, "'Heroic' Contrasts" July 26, 1913: 2).

¹⁵⁰Irwin M. Marcus, "The Johnstown Steel Strike of 1919: The Struggle for Unionism and Civil Liberties," *Pennsylvania History* 63 (1996): 100.

casualties. On the eve of America's entry into the First World War, President Wilson predicted to *New York World* editor Frank Cobb that "the Constitution would not survive" the war and "free speech and the right of assembly would go."¹⁵¹ Seven months later, Wilson's words seemed ominously prescient when the Bolshevik Revolution in Russia triggered the First Red Scare. Over the next few years, the federal government constrained the freedom of assembly through shortsighted legislation like the Espionage Act of 1917 (and its 1918 amendments) and the Immigration Act of 1918, and the Justice Department's infamous Palmer Raids in 1920, which "effectively torpedoed most notions of freedom of expression and freedom of association that survived the war fought to make the world safe for democracy."¹⁵²

1. Holmes, Brandeis, and a New Conception of the First Amendment

Despite the Red Scare, and probably because of some of the flagrant abuses of civil liberties that occurred during it, libertarian interpretations of the First Amendment that had surfaced prior to World War I began to take shape soon into the interwar period. Harvard law professor Zechariah Chafee led the doctrinal charge with his 1919 article "Freedom of Speech in War Time"¹⁵³ and his book *Freedom of Speech* the following

¹⁵¹John Heaton, *Cobb of "The World" A Leader in Liberalism* (New York: E.P. Dutton, 1924): 269-70. There has been some debate as to when or even whether the conversation occurred. See Jerold S. Auerbach, "Woodrow Wilson's 'Prediction' to Frank Cobb: Words Historians Should Doubt Ever Got Spoken," *The Journal of American History* 54, no. 3 (1967): 608-17; Arthur S. Link, "That Cobb Interview," *The Journal of American History* 72, no. 1 (1985): 7-17.

¹⁵²Soifer, *Law and the Company We Keep*, 57.

¹⁵³Zechariah Chafee, Jr., "Freedom of Speech in War Time," *Harvard Law Review* 32 (1919): 932-973.

year.¹⁵⁴ Although Chafee's scholarship was shaky, it "provided intellectual cover for Justices Holmes and Brandeis when they began to dissent in First Amendment cases in the fall of 1919."¹⁵⁵

References to free speech and assembly also increased in political rhetoric. In 1920, Senator Warren Harding's acceptance speech as the Republican presidential nominee warned that "[w]e must not abridge the freedom of speech, the freedom of press, or the freedom of assembly."¹⁵⁶ In 1921, the Intercollegiate Liberal League organized at Harvard and asserted that it would "espouse no creed or principle other than the complete freedom of assembly and discussion in the college."¹⁵⁷ Meanwhile, Samuel Gompers repeatedly invoked the freedoms of speech and assembly in his battle against labor injunctions.¹⁵⁸

¹⁵⁴Zechariah Chafee, Jr., *Freedom of Speech* (New York: Harcourt, Brace, and Howe, 1920).

¹⁵⁵Rabban, *Free Speech in Its Forgotten Years*, 7. For the importance of Chafee's work to Holmes and Brandeis, see Rabban, *Free Speech in Its Forgotten Years*, 5. See also John Wertheimer, "Freedom of Speech: Zechariah Chafee and Free-Speech History," *Reviews in American History* 22 (1994): 367, 374. On the problems with Chafee's scholarship, see Wertheimer, "Freedom of Speech," 374-75 (Chafee's "record as a scholar rightly gives us pause."). Wertheimer also notes that Chafee's advocacy was not without personal risk: "A group of conservative Harvard Law School alumni, with behind-the-scenes help from J. Edgar Hoover and the Justice Department, launched a campaign to have Chafee fired from Harvard on the grounds that his free-speech writings rendered him unfit to continue teaching there." *Ibid.*, 368.

¹⁵⁶*Washington Post*, "Pertinent Points in Republican Acceptance Speech," July 23, 1920: 4.

¹⁵⁷*New York Times*, "College Liberals Organize League," April 4, 1921.

¹⁵⁸*New York Times*, "Gompers Fights Sedition Bill," January 19, 1920: 15 (Sterling-Graham sedition bill "can be used to kill free speech and free assembly"); *ibid.*, "Labor Will Fight for Every Right, Gompers Asserts," June 13, 1922: 1 (arguing against the denial of "freedom of expression, freedom of press, and the freedom of assembly"); *ibid.*, "Gompers Assails Harding on Unions," July 1, 1923: 3 (Daugherty injunction "sought to

The growing recognition of the connection between speech, assembly, and democracy is strikingly evident in Brandeis's famous opinion in *Whitney v. California*.¹⁵⁹ Anita Whitney's appeal stemmed from her conviction under California's Criminal Syndicalism Act for having served as a delegate to the 1919 organizing convention of the Communist Labor Party of California.¹⁶⁰ Whitney was far from a marginalized subversive: her pedigree included an 1889 degree from Wellesley, a father who was a California state senator, and an uncle who was a Supreme Court justice. But the Court nevertheless rejected her argument that the California law violated her rights under the First Amendment, expressing particular concern that her actions had been undertaken in concert with others, which "involve[d] even greater threat to the public peace and security than the isolated utterances and acts of individuals."¹⁶¹

Rejecting this rationale, Brandeis penned some of the most well-known words in American jurisprudence. Brandeis wrote:

deny the constitutional rights of freedom of speech, freedom of assembly, and freedom of the press to railroad workers"). In 1951, President Truman, speaking at the dedication of a memorial to Gompers, said that "Above all, he fought the labor injunction because it was used to violate the constitutional rights to free speech and freedom of assembly." Harry S. Truman, *Addresss at the Dedication of a Square in Washington to the Memory of Samuel Gompers* (October 27, 1951), courtesy of John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara: University of California (host).

¹⁵⁹*Whitney v. California*, 274 U.S. 357 (1927) (Brandeis J., concurring). The decision was formally overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). Brandeis concurred rather than dissented in *Whitney* on procedural grounds, but his opinion strongly rebuked the majority's reasoning. See generally, Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge: Harvard University Press: 1984): 306.

¹⁶⁰For a riveting account of the background to *Whitney*, see Vincent Blasi, "The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*," *William and Mary Law Review* 29 (1988).

¹⁶¹*Whitney*, 372.

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.¹⁶²

The freedoms of “speech and assembly” lie at the heart of Brandeis’s argument—the phrase appears eleven times in his brief concurrence. The Court had linked these two freedoms only once before; after *Whitney*, the nexus occurs in over one hundred of its opinions.¹⁶³ The connection recognizes the importance of assembly to speech and expression—the people gathered convey not only spoken words but also the expression of the gathering itself.

There was, however, one group that even Brandeis considered beyond the constitutional protections of free assembly: the Ku Klux Klan. The year after *Whitney*, Brandeis joined an 8-1 majority in *Bryant v. Zimmerman* that rejected the Klan’s challenge to a New York law mandating that associations requiring an oath for membership and having twenty or more members file documents including a membership

¹⁶²*Ibid.*, 375 (Brandeis, J. concurring). Judges and scholars have written volumes about these words and those that followed, but almost all of them focus on speech alone rather than speech and assembly. Justice Brennan, writing for the Court in the landmark case *New York Times v. Sullivan*, deemed Brandeis’s *Whitney* concurrence the “classic formulation” of the fundamental principle underlying free speech. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Cf. H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* (Chicago: University of Chicago Press: 2002): 194. See also Robert Cover, “The Left, the Right, and the First Amendment: 1918-1928,” *Maryland Law Review* 40 (1981): 371 (“classic statement of free speech”).

¹⁶³For the only mention of “speech and assembly” prior to *Whitney*, see *New York ex rel Doyle v. Atwell*, 261 U.S. 590, 591 (1923) (noting that petitioners alleged a deprivation of the “rights of freedom of speech and assembly”).

roster and a list of officers.¹⁶⁴ Under the law, members of an association with knowledge that the association had failed to register were guilty of a misdemeanor.¹⁶⁵ The Court dismissed a number of constitutional challenges from a Klansman who had been imprisoned after the Klan failed to register, including his argument that the New York statute deprived him of “liberty” and prevented him “from exercising his right of membership in the organization,” in violation of the Due Process Clause of the Fourteenth Amendment.¹⁶⁶ The Court concluded that in this case, liberty “must yield to the rightful exertion of the police power” and there “can be no doubt that under that power the State may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare.”¹⁶⁷

2. New Challenges to Labor

In the early 1920s, the conservative wing of the Supreme Court issued a series of anti-labor decisions aimed at stopping picketing and union organizing.¹⁶⁸ But by 1933, workers had sought legislative relief, and the National Industrial Recovery Act provided

¹⁶⁴*Bryant v. Zimmerman*, 278 U.S. 63, 66 (1928). Justice McReynolds’s lone dissent reflected his belief that the Court lacked jurisdiction in the case. *Ibid.*, 77 (McReynolds, J., dissenting).

¹⁶⁵*Ibid.* The law exempted “labor unions” and “benevolent orders.” *Ibid.*

¹⁶⁶*Ibid.*, 72.

¹⁶⁷*Ibid.* The State of Alabama relied unsuccessfully on *Zimmerman* in *NAACP v. Alabama*. See the discussion of *Alabama* in the following chapter.

¹⁶⁸Cover, *The Left, the Right, and the First Amendment*, 354.

the first guarantee to workers of the right to organize in associations. Two years later, the Wagner Act sought to strengthen the associational rights of workers even further.

On April 10, 1936, Congress initiated hearings on legislation to authorize the Committee on Education and Labor to investigate “violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively.”¹⁶⁹ National Labor Relations Board chairman J. Warren Madden testified that “[t]he right of workmen to organize themselves into unions has become an important civil liberty” and that workers could not organize without exercising the rights of free speech and assembly.¹⁷⁰ Following the hearings and subsequent approval of the Senate measure, Committee Chair Hugo Black named Senator Robert La Follette, Jr., of Wisconsin to chair a subcommittee to investigate these concerns. The La Follette Committee embarked with “the zeal of missionaries” in an exhaustive investigation that spanned five years.¹⁷¹ When it concluded, La Follette reported to Congress that “[t]he most spectacular violations of civil liberty . . . [have] their roots in economic conflicts of interest” and emphasized that “[a]ssociation and self-organization are simply the result of the exercise of the fundamental rights of free speech and assembly.”¹⁷²

Rhetoric across the political spectrum echoed the increased appeals to assembly in the labor context. In a 1935 speech on Constitution Day, former President Hebert Hoover

¹⁶⁹Jerold S. Auerbach, "The La Follette Committee: Labor and Civil Liberties in the New Deal," *The Journal of American History* 51, no. 3 (1964): 440 (citing Cong. Record, 74 Cong, 2 Sess, 4151).

¹⁷⁰*Ibid.*, 440 n.30.

¹⁷¹*Ibid.*, 442.

¹⁷²*Ibid.*, 442 n.32 (quoting Cong. Record, 77 Cong, 2 Sess, 3311 (April 3, 1942)).

listed assembly among the core freedoms that guarded liberty.¹⁷³ That same year, Roosevelt's Interior Secretary Harold Ickes referred to the freedoms of speech, press, and assembly as "the three musketeers of our constitutional forces" at an address before an annual luncheon of the Associated Press.¹⁷⁴ Ickes asserted that "We might give up all the rest of our Constitution, if occasion required it, and yet have sure anchorage for the mooring of our good ship America, if these rights remained to us unimpaired."¹⁷⁵

3. Assembly Made Applicable to the States

In 1937, the Supreme Court made the freedom of assembly applicable to state action in *De Jonge v. Oregon*.¹⁷⁶ Dirk De Jonge had spoken before a group of 150 people at a Portland meeting that occurred under the auspices of the Communist Party.¹⁷⁷ During his speech, De Jonge protested against conditions at the county jail and the actions of the police in response to an ongoing maritime strike.¹⁷⁸ He had been convicted under Oregon's criminal syndicalism statute and sentenced to seven years'

¹⁷³*New York Times*, "Hoover's Warning of the Perils to Liberty," September 18, 1935: 10.

¹⁷⁴*New York Times*, "Long and Coughlin Classed by Ickes as 'Contemptible'," April 23, 1935: 1.

¹⁷⁵*Ibid.*

¹⁷⁶*De Jonge v. Oregon*, 299 U.S. 353 (1937). The precise nature of how the freedom of assembly limited state action through the Due Process Clause of the Fourteenth Amendment became the subject of extensive debate on the Court involving concepts like "incorporation" and "liberty." I explore these issues more fully in the next chapter.

¹⁷⁷Leahy, *First Amendment*, 316.

¹⁷⁸*Ibid.*

imprisonment.¹⁷⁹ A unanimous Supreme Court reversed the conviction. Chief Justice Hughes reasoned that:

The First Amendment of the Federal Constitution expressly guarantees that right [of assembly] against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.¹⁸⁰

Hughes underscored the significance of applying the right of assembly to state action by observing that “[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”¹⁸¹ In words strikingly similar to Brandeis’s *Whitney* concurrence, he emphasized the need:

. . . to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.¹⁸²

De Jonge laid the doctrinal framework to buttress assembly in response to the growing sensitivities to labor and political dissent that had emerged after the first Red Scare. Months later, the Court underscored in *Herndon v. Lowry* that “[t]he power of a state to abridge freedom of speech and of assembly is the exception rather than the

¹⁷⁹Ibid.

¹⁸⁰Ibid., 364.

¹⁸¹Ibid. Brandeis had declared the right of assembly to be fundamental in his *Whitney* concurrence ten years earlier. *Whitney*, 373.

¹⁸²*De Jonge*, 365.

rule.”¹⁸³ The case involved the appeal of Angelo Herndon, a young black man affiliated with the Communist Party in Georgia. In 1933, Herndon had been convicted of insurrection under a Reconstruction-era law and sentenced to 18-20 years’ imprisonment. The Communist Party’s International Labor Defense pursued his appeals, and within two years, “white liberals, labor leaders, and other citizens joined blacks and radicals in viewing the conviction as a serious threat to basic civil liberties, especially the rights of free speech and free assembly.”¹⁸⁴ After Herndon spent years languishing in a Georgia prison while his appeals went up and down the courts, the Supreme Court concluded that the statute under which he had been convicted was “merely a dragnet which may enmesh anyone who agitates for a change of government.”¹⁸⁵

4. *Hague v. C.I.O.*

At the end of 1938, the American Bar Association’s Committee on the Bill of Rights filed an amicus brief on the importance of the freedom of assembly in *Hague v. Committee for Industrial Organization*.¹⁸⁶ The appeal before the Third Circuit involved Mayor Frank Hague’s repeated denials of a permit to the Committee for Industrial Organization to hold a public meeting in Jersey City. The ABA’s lengthy brief emphasized the public and expressive nature of assembly, contending that “the integrity of the right ‘peaceably to assemble’ is an essential element of the American democratic

¹⁸³*Herndon v. Lowry*, 301 U.S. 242, 258 (1937).

¹⁸⁴Charles H. Martin, *The Angelo Herndon Case and Southern Justice* (Baton Rouge: Louisiana State University Press, 1976): xii.

¹⁸⁵*Herndon*, 258.

¹⁸⁶*Hague v. Committee for Industrial Organization*, 101 F.2d 774 (3rd Cir. 1939).

system” involving “the citizen’s right to meet face to face with others for the discussion of their ideas and problems—religious, political, economic or social,” that “assemblies face to face perform a function of vital significance in the American system,” and that public officials had the “duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so.”¹⁸⁷

The Committee’s filing garnered an unusual amount of attention for an amicus brief. The American Bar Association wrote that:

The filing of the brief was widely hailed as a great step in the defense of liberty and the American traditions of free speech and free assembly as basic institutions of democratic government. The clear and earnest argument of the brief was attested as an admirable exposition of the fundamental American faith. Hardly any action in the name of the American Bar Association in many years, if ever, has attracted as wide and immediate attention and as general acclaim, as the preparation and filing of this brief.¹⁸⁸

The *New York Times* reviewed the brief with similarly effusive language:

This brief ought to stand as a landmark in American legal history. It ought to be multiplied and spread about in all communities in which private citizens, private organizations or public officials dare threaten or suppress the basic guarantees of American liberty. It ought to be on file in every police station. It ought to be in every public library, in every school library, and certainly in the home of every voter in Jersey City.¹⁸⁹

¹⁸⁷The Committee on the Bill of Rights, "Brief of the Committee on the Bill of Rights of the American Bar Association" (hereinafter "Committee Brief") (February 27, 1939): 4, 7, 19.

¹⁸⁸"Association's Committee Intervenes to Defend Right of Public Assembly," *American Bar Association Journal* 25 (1939): 7.

¹⁸⁹*New York Times*, "A Brief for Free Speech," December 23, 1938: 18. The *Times* later wrote that the brief “was received all over the country with approval as a lucid exposition and defense of the fundamental guarantee of American liberty. *New York Times*, "Bar and Civil Liberties," July 17, 1939: 10. Zechariah Chafee had a substantial role in drafting the brief. When he published *Free Speech in the United States* two years later, his thirty-page discussion of the freedom of assembly consisted almost entirely of verbatim sections of the brief. See Chafee, *Free Speech in the United States*, 409-38.

The Third Circuit ruled in favor of the C.I.O., but Hague appealed to the Supreme Court, setting the stage for an even broader judicial endorsement of the freedom of assembly.¹⁹⁰

5. The Four Freedoms

In 1939, assembly joined religion, speech, and press as one of the “Four Freedoms” celebrated in the New York World’s Fair. Fair organizers commissioned Leo Friedlander to design of group of statues commemorating each of the four freedoms.¹⁹¹ Grover Whalen, the president of the fair corporation, credited *New York Times* president and publisher Arthur Sulzberger with the idea:

Mr. Sulzberger pointed out that if we portrayed four of the constitutional guarantees of liberty in the “freedom group” we could teach the millions of visitors to the fair a lesson in history with a moral. The lesson is that freedom of press, freedom of religion, freedom of assembly and freedom of speech, firmly fixed in the cornerstone of our government since the days of Washington, have enabled us to build the most successful democracy in the world. And the moral is that as long as these freedoms remain a part of our constitutional set-up we can face the problems of tomorrow, a nation of people calm, united and unafraid.¹⁹²

The buildup to the opening of the Fair began with New Year’s Day speeches celebrating each of the four freedoms that were broadcast internationally from Radio City Music Hall. Dorothy Thompson, the “First Lady of American Journalism,” delivered the

¹⁹⁰The Committee on the Bill of Rights had submitted a revised version of its amicus brief when the case had reached the Supreme Court. *Committee Brief*.

¹⁹¹*New York Times*, "Mile-Long Mall Feature of Fair," December 12, 1937: 57.

¹⁹²*Ibid*.

speech on the freedom of assembly.¹⁹³ Calling assembly “the most essential right of the four,” Thompson elaborated that:

The right to meet together for one purpose or another is actually the guaranty of the three other rights. Because what good is free speech if it impossible to assemble people to listen to it? How are you going to have discussion at all unless you can hire a hall? How are you going to practice your religion, unless you can meet with a community of people who feel the same way? How can you even get out a newspaper, or any publication, without assembling some people to do it?¹⁹⁴

Three months later, Columbia University president Nicholas Butler penned a *New York Times* editorial on “The Four Freedoms.”¹⁹⁵ With the European conflict in mind, Butler warned of the “millions upon millions of human beings living under governments which not only do not accept the Four Freedoms, but frankly and openly deny them all.”¹⁹⁶ The following month, the *Times* ran an editorial by Henry Steele Commager, who decried the assaults on the “four fundamental freedoms” and concluded his essay by asserting that:

The careful safeguards which our forefathers set up around freedom of religion, speech, press and assembly prove that these freedoms were thought to be basic to the effective functioning of democratic and

¹⁹³*New York Times*, “Fair to Broadcast to World Today,” January 1, 1939: 13. Thompson was at the time a news commentator for the New York Herald Tribune. She was considered by some to be “the most influential woman in the United States after Eleanor Roosevelt,” and her syndicated column, “On the Record,” reached an estimated eight to ten million readers three times a week. Susan Ware, *Letter to the World: Seven Women Who Shaped the American Century* (New York: Norton, 1998): 45. Thompson’s portrait made the cover of *Time* on June 13, 1939. *Ibid.*, 47.

¹⁹⁴Dorothy Thompson, “Democracy,” *Dorothy Thompson Papers, Series VII, Box 6* (Syracuse University Library) (January 1, 1939): 1. Thompson’s speech pitted the free assembly of democracy against the abuses of fascism.

¹⁹⁵Nicholas Murry Butler, “The Four Freedoms,” *New York Times*, March 5, 1939: AS5.

¹⁹⁶*Ibid.* Pictures of Friedlander’s statues accompanied the editorial.

republican government. The truth of that conviction was never more apparent than it is now.¹⁹⁷

On April 30, 1939, the opening day of the World's Fair, New York Mayor Fiorello La Guardia called the site of Friedlander's four statues the "heart of the fair."¹⁹⁸ Before an audience of 15,000 to 20,000, La Guardia proclaimed that the right of assembly "must be given to any group who desire to meet and there discuss any problem that they desire."¹⁹⁹

Barely a month after the opening of the World's Fair, the Supreme Court issued its decision in *Hague*.²⁰⁰ Justice Roberts relied on the Privileges and Immunities Clause to hold the freedom of assembly applicable to Mayor Hague's actions.²⁰¹ The *New York Times*'s coverage of the decision pronounced that "with the right of assembly reasserted, all 'four freedoms' of [the] Constitution are well established."²⁰²

Hague's words on the heels of the tribute to the four freedoms at the World's Fair appeared to anchor assembly in political discourse. Indeed, a poll by Elmo Roper's organization at the end of 1940 reported that 89.9% of respondents thought their personal

¹⁹⁷Henry Steele Commager, "To Secure the Blessings of Liberty," *New York Times*, April 9, 1939: SM3.

¹⁹⁸*New York Times*, "Mayor Dedicates Plaza of Freedom," May 1, 1939: 4.

¹⁹⁹*Ibid.*

²⁰⁰*Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).

²⁰¹*Ibid.* Roberts reached his assembly analysis through a somewhat contorted interpretation of the privileges and immunities clause. Justice Stone's concurrence pointed out that neither of the parties had raised this argument, and that *De Jonge*'s analysis of the due process clause should have been controlling. *Ibid.*, 518 (Stone, J., concurring).

²⁰²*New York Times*, "A Fundamental Liberty Upheld in Hague Case," June 11, 1939: E7.

liberties would be decreased by restrictions on freedom of assembly (compared to 81.5% who expressed concern over restrictions on “freedom of speech by press and radio”).²⁰³ Americans appeared resolute in their belief of the indispensability of free assembly to democracy.

Politics and history decided otherwise. On January 6, 1941, President Roosevelt proclaimed “four essential human freedoms” in his State of the Union Address. Rather than refer to the freedoms of speech, religion, assembly and press that had formed the centerpiece of the World’s Fair, Roosevelt’s “Four Freedoms Speech” called upon freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. The new formulation—absent assembly—quickly overtook the old. Seven months later, Roosevelt and Churchill incorporated the new four freedoms into the Atlantic Charter. In 1943, Norman Rockwell created four paintings inspired by Roosevelt’s Four Freedoms. The paintings were published in successive editions of *The Saturday Evening Post*, accompanied by matching essays expounding upon each of the freedoms. And like the earlier four freedoms, the new ones were also set to stone. Roosevelt commissioned Walter Russell to create the Four Freedoms Monument, which was dedicated at Madison Square Garden. Today, the Franklin and Eleanor Roosevelt Institute honors well-known individuals with the “Four Freedoms Award.”

G. THE RHETORIC OF ASSEMBLY

Although Roosevelt’s Four Freedoms neglected assembly, the right did not disappear from political and legal discourse overnight. In 1941, a group called “The Free

²⁰³ *Wall Street Journal*, “Public Mind in Good Health,” January 7, 1941: 4.

Company” penned a series of radio dramas about the First Amendment. Attorney General Robert Jackson and Solicitor General Francis Biddle helped shape the group, which included Robert Sherwood (then Roosevelt’s speechwriter), William Saroyan, Maxwell Anderson, Ernest Hemmingway, and James Boyd.²⁰⁴ The illustrious group operated under what was “virtually a Government charter” to spread a message of democracy.²⁰⁵

Orson Welles wrote *The Free Company’s* play on the freedom of assembly, “His Honor, the Mayor.” Welles’s play portrayed the dilemma of Bill Knaggs, a fictional mayor confronted with an impending rally of a group called the “White Crusaders.” After deciding to allow the rally, the mayor addressed the crowd that had gathered to protest the meeting:

[D]on’t start forbiddin’ anybody the right to assemble. Democracy’s a rare and precious thing and once you start that—you’ve finished democracy! Democracy guarantees freedom of assembly unconditionally to the worst lice that want it. . . . All of you’ve read the history books. You know what the right to assemble and worship God meant to most of those folks that first came here, the ones that couldn’t pray the way they wanted to in the old country?²⁰⁶

The play concluded with music followed by the voice of the narrator:

Like his honor, the Mayor, then, let us stand fast by the right of lawful assembly. Let us say with that great fighter for freedom, Voltaire, “I disapprove of what you say but I will defend to the death your right to say it.” Thus one of our ancient, hard-won liberties will be made secure and we, differing though we may at times among ourselves, will stand together on a principle to make sure that government of the people, by the people, for the people shall not perish from the earth.²⁰⁷

²⁰⁴*Time*, “Of Thee They Sing,” February 24, 1941.

²⁰⁵*Time*, “Freely Criticized Company,” April 28, 1941.

²⁰⁶Orson Welles, *His Honor, The Mayor* (1941).

²⁰⁷*Ibid.*

Not everyone shared these sentiments. Following the broadcast of “His Honor, The Mayor,” the Hearst newspaper chain and the American Legion attacked it as “un-American and tending to encourage communism and other subversive groups” and “cleverly designed to poison the minds of young Americans.”²⁰⁸ The next week, J. Edgar Hoover drafted a Justice Department memorandum “concerning the alleged Communist activities and connections of Orson Welles.”²⁰⁹

Later in 1941, festivities around the country marked the sesquicentennial anniversary of the Bill of Rights. In Washington D.C.’s Post Square, celebration organizers displayed an enormous copy of the Bill of Rights next to the four phrases: “Freedom of Speech, Freedom of Assembly, Freedom of Religion, Freedom of the Press.”²¹⁰ President Roosevelt served as the honorary chairman of the Sesquicentennial Committee, which issued a proclamation describing the original four freedoms as “the pillars which sustain the temple of liberty under law.”²¹¹ Days before the attack on Pearl Harbor, Roosevelt declared that December 15, 1941, would be “Bill of Rights Day.” Roosevelt heralded the “immeasurable privileges” of the First Amendment and signed the proclamation against the backdrop of a mural listing the original four freedoms.²¹² The

²⁰⁸Charles Higham, *Orson Welles: The Rise and Fall of an American Genius* (New York: St. Martin's Press, 1985): 175; *Time*, “Freely Criticized Company.”

²⁰⁹Matthew F. McGuire, *Memorandum for the Assistant to the Attorney General* (April 24, 1941).

²¹⁰*Washington Post* (December 15, 1941).

²¹¹Henry Steele Commager, “Charter of Our Way of Life,” *New York Times*, December 14, 1941: SM6.

²¹²*New York Times*, “Day Will Honor Bill of Rights,” November 29, 1941: 19.

photo op was not without irony; less than three months later, he signed Executive Order 9066 authorizing the internment of Japanese Americans.

Although the Supreme Court endorsed the President's restrictions on the civil liberties of Japanese Americans in *Hirabayashi v. United States*²¹³ and *Korematsu v. United States*,²¹⁴ it elsewhere affirmed a core commitment to the Bill of Rights generally and the freedom of assembly in particular. In 1943, Justice Jackson wrote in *West Virginia v. Barnette*²¹⁵ that:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²¹⁶

Two years later, the Court emphasized in *Thomas v. Collins* that restrictions of assembly could only be justified under the “clear and present danger” standard that the Court had adopted in its free speech cases. By a 5-4 majority, the Court overturned the contempt conviction of a labor spokesman who had given a speech in Houston despite a restraining order prohibiting him from doing so. Because of the “*preferred place* given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment,” the Court concluded that only “the gravest abuses, endangering paramount

²¹³*Hirabayashi v. United States*, 320 U.S. 81 (1943).

²¹⁴*Korematsu v. United States*, 323 U.S. 214 (1944).

²¹⁵*West Virginia v. Barnette*, 319 U.S. 624 (1943).

²¹⁶*Ibid.*, 638.

interests, give occasion for permissible limitation.”²¹⁷ Justice Rutledge’s opinion noted that the right of assembly guarded “not solely religious or political” causes but also “secular causes,” great and small.²¹⁸ And Rutledge recognized the expressive nature of assembly by noting that the rights of the speaker and the audience were “necessarily correlative.”²¹⁹ As Aviam Soifer has suggested, Rutledge’s “dynamic, relational language” emphasized that the right of assembly was “broad enough to include private as well as public gatherings, economic as well as political subjects, and passionate opinions as well as factual statements.”²²⁰

A further endorsement of assembly came by way of the executive branch in the 1947 Report of the President’s Committee on Civil Rights.²²¹ The Report indicated that the “great freedoms” of religion, speech, press, and assembly were “relatively secure” and that citizens were “normally free . . . to assemble for unlimited public discussions.”²²² Noting growing concerns about “Communists and Fascists,” the Committee asserted that

²¹⁷*Thomas v. Collins*, 530-31 (emphasis added).

²¹⁸*Ibid.* The “preferred place” language originated in Justice Douglas’s opinion for the Court in *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”).

²¹⁹*Ibid.*, 534.

²²⁰Soifer, *Law and the Company We Keep*, 77, 78.

²²¹*To Secure These Rights, The Report of the Presidents Committee on Civil Rights* (New York: Simon and Schuster, 1947). President Truman established the Committee with Executive Order 9808 (December 5, 1946).

²²²*Ibid.*, 47.

it “unqualifiedly opposes any attempt to impose special limitations on the rights of these people to speak and assemble.”²²³

H. THE END OF ASSEMBLY

Despite the rhetorical tributes to assembly in Supreme Court opinions and popular discourse, assembly as a constitutional right lacked a coherent doctrinal framework. Frequent invocations of Brandeis’s phrase “speech and assembly” usually meant that the Court resolved challenges to the latter within the growing doctrinal framework of the former.²²⁴ By the mid-1960s, the only cases addressing the freedom of assembly (as opposed to the freedom of association) were those overturning convictions of African-Americans who had participated in peaceful civil rights demonstrations.²²⁵ Martin Luther King, Jr. also appealed to assembly in his *Letter from a Birmingham Jail* and in his speech, *I’ve Been to the Mountaintop*, delivered just prior to his assassination.²²⁶ But by

²²³Ibid., 48.

²²⁴The right of petition suffered a similar fate. See Stephen H. Higginson, “A Short History of the Right to Petition Government for a Redress of Grievances,” *Yale Law Journal* 96 (1986): 142 (“the right of petition was collapsed into the right of free speech and expression...”). See also David C. Frederick, “John Quincy Adams, Slavery, and the Disappearance of the Right of Petition,” *Law and History Review* 9 (1991): 113-55, 141 (the Supreme Court “merged the right of petition with other first amendment rights in a doctrine that obscures both the original meaning and the form of the right”).

²²⁵See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); and *Gregory v. City of Chicago*, 394 U.S. 111 (1969). Cf. *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (“The First [Amendment] does] not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be ‘annoying’ to some people.”).

²²⁶See Martin Luther King, Jr., *Letter from a Birmingham Jail* (April 16, 1963) (asserting that the Birmingham ordinance denied “citizens the First Amendment privilege of peaceful assembly and protest”); Martin Luther King, Jr., *I’ve Been to the Mountaintop* (April 3, 1968) (“But somewhere I read of the freedom of assembly . . .”).

the end of the 1960s, the right of assembly applied only to public gatherings like protests and demonstrations. Any earlier intimations of a broadly construed right beyond these narrow circumstances were largely forgotten.

In 1983, the Court swept the remnants of assembly within the ambit of free speech jurisprudence in *Perry Education Association v. Perry Local Educators' Association*.²²⁷ Justice White reasoned that:

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.²²⁸

The doctrinal language came straight out of the Court's free speech cases and made no mention of the right of assembly.²²⁹ With *Perry*, even cases involving protests or demonstrations could now be resolved without reference to assembly. The Court's 1988

²²⁷*Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

²²⁸*Ibid.*, 45 (citations and quotations omitted).

²²⁹*Perry* cited *Carey v. Brown*, 447 U.S. 455, 461 (1980); *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-536 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Schneider v. State*, 308 U.S. 147 (1939).

opinion in *Boos v. Barry* exemplifies this change.²³⁰ *Boos* involved a challenge to a District of Columbia law that prohibited, among other things, congregating “within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes.”²³¹ On its face, the challenge to the regulation appeared to rest on the right of assembly. The petitioner challenged the “deprivation of First Amendment speech and assembly rights” and argued that “[t]he right to congregate is a component part of the ‘right of the people peaceably to assemble’ guaranteed by the First Amendment.”²³² Justice O’Connor’s opinion for the Court cited *Perry* three times and resolved the case under a free speech analysis without reference to the freedom of assembly. The Court, in fact, has not addressed a freedom of assembly claim in the last twenty years.²³³

²³⁰*Boos v. Barry*, 485 U.S. 312 (1988).

²³¹*Ibid.*, 315.

²³²*Boos v. Barry*, Brief for Petitioner at *74, *64 (1987 U.S. S. Ct. Briefs LEXIS 417).

²³³In *Chicago v. Morales*, 527 U.S. 41 (1999), the Court addressed the constitutionality of a Chicago ordinance that prohibited “criminal street gang members” from loitering in public places. But while the lower court had relied on the freedom of assembly to hold the ordinance unconstitutional, the Supreme Court cited “the First Amendment ‘right of association’ that our cases have recognized.” *Ibid.*, 53. Justice Scalia has invoked the freedom of assembly (among others) in his dissents from the Court’s decisions upholding restrictions on the activities of antiabortion protesters. See *Madsen v. Women’s Health Center*, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting) and *Hill v. Colorado*, 530 U.S. 703, 774, 779 (2000) (Scalia, J., dissenting).

II. The Emergence of Association in the National Security Era

In the preceding chapter, I recounted the forgotten story of the freedom of assembly in American political and legal discourse. At least part of the reason for the loss of assembly has been the emergence and entrenchment of the judicially recognized right of association. I turn my attention to the development of that right in this chapter and the one that follows. The rise of constitutional association in many ways depended upon surrounding political and cultural contexts. I have divided these contexts into two eras. The first, which I call the national security era, began in the late 1940s and lasted until the early 1960s. It formed the background for the initial recognition of the right of association in *NAACP v. Alabama*.¹ This is the subject of the present chapter. The second, which I call the equality era, spanned from the early 1960s to the end of the twentieth century and included an important reinterpretation of the right of association in *Roberts v. United States Jaycees*.² I address the equality era in the next chapter.

In the national security era, three factors influenced the shaping of association: (1) the conflation of rampant anti-communist sentiment with the rise of the civil rights movement (a political factor); (2) infighting on the Court over the proper way to ground the right of association in the Constitution and the relationship between association and

¹*NAACP v. Alabama*, 357 U.S. 449 (1958).

²*Roberts v. United States Jaycees*, 468 U.S. 609 (1984). *Roberts* divided the right of association into intimate and expressive components and introduced the constitutional framework that continues today.

assembly (a jurisprudential factor); and (3) the pluralist political theory of mid-twentieth century liberalism that emphasized the importance of consensus, balance, and stability (a theoretical factor).

The primary political factor that influenced the right of association emerged from the historical coincidence of the Second Red Scare and the Civil Rights movement. From the late 1940s to the early 1960s, the government's response to the communist threat pitted national security interests against individual and group autonomy. These tensions were mimicked (albeit somewhat artificially) in the South when segregationists analogized the unrest stirred by the NAACP to the threats posed by communist organizations; segregationists even charged that the NAACP itself was infiltrated by communist influences. The Supreme Court responded unevenly, suppressing communist organizations in the name of order and stability but protecting the NAACP.

The jurisprudential factor shaping the right of association involved disagreement on the Court over the constitutional source of association. The issue was most evident when the Court applied the right of association to limit state (as opposed to federal) law. Justices Frankfurter and Harlan argued that association constrained state action because it, like other rights, could be derived from the "liberty" of the Due Process Clause of the Fourteenth Amendment. I refer to this as the *liberty argument*. Justices Black, Douglas, Brennan, and Warren insisted that association could be located in some aspect of the First Amendment and argued that it be given the same "preferred position" as other First Amendment rights. On their view, the right of association applied to the states because the Fourteenth Amendment had incorporated the provisions of the First Amendment. I call this the *incorporation argument*. At times, Black and Douglas also argued that the

right of association was part of the right of assembly. I call this the *assembly argument*. Although it received only minimal attention from the justices, the assembly argument may have offered the most sensible and least complicated constitutional link for the right of association. Instead, disagreement between the justices over the liberty argument and the incorporation argument framed the legal discussion that in turn shaped the right of association. As I will show, this disagreement is evident in the Court's 1957 decision in *Sweezy v. New Hampshire*.³ Harlan's opinion in *NAACP v. Alabama* can be read in part as an attempt to accommodate the tensions raised in *Sweezy*. But his ambiguous wording left the doctrinal framing of association open to interpretation.

The theoretical factor influencing the shaping of association was mid-twentieth century liberalism. Constitutional association developed within an already narrowed discourse that began with pluralist claims about the relationship between groups and the state. Arthur Bentley and Harold Laski advanced early versions of these claims during the first half of the twentieth century. Postwar pluralists like David Truman and Robert Dahl popularized them in the 1950s and 1960s. Two pluralist assumptions aided the embrace of the constitutional right of association: the balance and stability between groups, and the "liberal consensus" of American politics. Truman and Dahl supported these premises through appeals to the two great theorists of association in the American context: James Madison and Alexis de Tocqueville. The pluralist claims and their attendant interpretations of Madison and Tocqueville helped establish a theoretical background that qualified group autonomy by the interests of the democratic state.

³*Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (plurality opinion).

It is my contention that the above three factors contributed to three changes detrimental to group autonomy that can be linked to the shift from assembly to association: (1) dissenting and destabilizing groups protected by the right of assembly were rejected by a right of association predicated upon a bounded consensus; (2) practices that constituted public and political life in the context of the right of assembly were depoliticized and privatized by a right of association that developed among a dispersion of public power and a narrowing of the scope of what comprised the political; and (3) assemblies that were forms of expression were replaced by associations that were merely means of expression. My objective in this chapter and the one that follows is simply to illustrate the plausibility of these changes and their connection to the shift from assembly to association. In Chapter 4, I will explore the implications of these changes when I compare the right of assembly to the right of association using the contours of contemporary political theory.

A. THE POSTWAR POLITICAL CONTEXT AND THE COMMUNIST THREAT

The political context that shaped the constitutional right of association included a growing paranoia over the threat of domestic communism in the late 1940s and early 1950s. The ubiquity of these concerns across the branches of state and federal government in many ways upset the checks and balances that guarded against incursions into civil liberties. It was not the first time that the American experiment faltered under such pressures, and as recent reactions to the threat of domestic terrorism attest, it would not be the last.⁴ But peculiar to the emergence of the right of association in the context of

⁴A concise account of some of the more egregious episodes in our nation's history is provided in *Rasul v. Bush*, 524 U.S. 466 (2004), Brief of Amicus Curiae Fred Korematsu

what became the Second Red Scare—perhaps in a way paralleled only by the right of assembly asserted by the Democratic-Republican Societies in the 1790s—was the claim to an untested constitutional right of group autonomy raised by those outside of the political mainstream during a politically tumultuous time.

1. Executive and Legislative Measures

The federal government had actively pursued the threat of domestic communism since the formation of the House Committee on Un-American Activities (HUAC) in 1938.⁵ Concern over “subversive” government employees had prompted the Hatch Act in 1939, the Civil Service Commission’s War Service Regulations in 1942, and the formation of the Attorney General’s Interdepartmental Committee on Investigations in 1942.⁶ In 1947, the President’s Committee on Civil Rights reported that while “the government has the obligation to have in its employ only citizens of unquestioned loyalty,” our “whole civil liberties history provides us with a clear warning against the

in Support of Petitioners. Korematsu was the petitioner in *Korematsu v. United States*, 323 U.S. 214 (1944). Concerns over domestic terrorism prompted then Deputy Assistant Attorney General John Yoo to advise the White House and Department of Defense that “First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully.” See John Yoo, “Authority for Use of Military Force to Combat Terrorist Activities Within the United States,” October 23, 2001, p. 24.

⁵Formed at the urging of Congressman Martin Dies of Texas, the investigative body was popularly known as the “Dies Committee” from 1938-1945. From 1945 to 1957, the House Committee on Un-American Activities (HUAC) conducted over 230 public hearings and examined over 3,000 witnesses, 135 of whom were cited for contempt. Carl Beck, *Contempt of Congress: A Study of the Prosecutions Initiated by the Committee on Un-American Activities, 1945-1957* (New Orleans: Hauser Press, 1959), 181.

⁶See generally Thomas Emerson and David Helfeld, “Loyalty Among Government Employees,” *Yale Law Journal* 58 (1948): 8-19 (discussing the development of federal government’s loyalty program).

possible misuse of loyalty checks to inhibit freedom of opinion and expression.”⁷ The Committee specifically cautioned of the dangers posed by “any standard which permits condemnation of persons or groups because of ‘association.’”⁸

That same year, President Truman established the Federal Employee Loyalty Program, which empowered the federal government to deny employment to “disloyal” individuals.⁹ The government’s loyalty determination could consider “activities and associations” that included “[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive.”¹⁰ Attorney General Tom Clark quickly generated a list of 123 “subversive” organizations.¹¹ Within a year, the FBI had examined over two million federal employees and conducted over 6,300 full investigations.¹²

Constitutional scholar Thomas Emerson attacked the loyalty program in a 1947 article in the *Yale Law Journal*, contending that the investigations encompassed “not only membership and activity in organizations, including labor unions, but private beliefs,

⁷*To Secure These Rights, The Report of the Presidents Committee on Civil Rights* (New York: Simon and Schuster, 1947): 50.

⁸*Ibid.*

⁹Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), 176 (quoting Executive Order 9835, March 22, 1947).

¹⁰Executive Order 9835, March 22, 1947.

¹¹Emerson and Helfeld, "Loyalty Among Government Employees," 32. Emerson co-founded the Emergency Civil Liberties Committee in 1951.

¹²*Ibid.* By 1951, the FBI had initiated 14,000 full-scale investigations of federal employees, which had led to over 2,000 resignations. Melvin Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Boston: Twayne, 1991), 107.

reading habits, receipts of mail, associations, and personal affairs.”¹³ Emerson charged that the program relied upon “the legal premise that Federal employees are entitled to no constitutional protection” and ignored “the right to freedom of political expression embodied in the First Amendment.”¹⁴ To Emerson, this “concept of the right to freedom of political expression” emerged from “the specific guarantees of freedom of speech, freedom of the press, the right of assembly and the right to petition the government.”¹⁵ This right of political expression was “basic, in the deepest sense, for it underlies the whole theory of democracy.”¹⁶

Emerson didn’t explicitly reference a “freedom of association,” but he cited a speech delivered earlier in the year to the State Bar of California by the powerful federal judge, Charles Wyzanski, Jr.¹⁷ In that speech, Wyzanski had offered “an inquiry into freedom of association,” suggesting that despite the “verbal kinship of the phrases freedom of speech, freedom of assembly and freedom of association . . . the triad represented an ascending order of complexity.”¹⁸ The term “association” implied “a

¹³Emerson and Helfeld, "Loyalty Among Government Employees," 70.

¹⁴Ibid., 79, 81.

¹⁵Ibid., 83.

¹⁶Ibid. Emerson’s article drew a fiery response from J. Edgar Hoover, whose comments were printed in the next issue of the *Yale Law Journal* 58 (1948): 401.

¹⁷Charles Wyzanski Jr., "The Open Window and the Open Door: An Inquiry into Freedom of Association," *California Law Review* 35 (1947): 336-51. Roosevelt appointed Wyzanski to the federal bench in 1941. He served in that capacity for 45 years, presided over the Harvard University Board of Overseers, and served as a trustee of the Ford Foundation. Eric Pace, "Charles E. Wyzanski, 80, is Dead," *New York Times*, September 5, 1986, p. A20. Frankfurter had mentored Wyzanski at Harvard and called him “one of the most brilliant students I ever had.” Ibid.

¹⁸Wyzanski, "The Open Window and the Open Door," 336-37.

body of persons who have assembled not on an *ad hoc*, but on a more or less permanent, basis and who are likely to seek to advance their common purposes not merely by debate but often in the long run by overt action.”¹⁹ The “peculiarly complicated” freedom of association “cuts underneath the visible law to the core of our political science and our philosophy.”²⁰ Wyzanski contended that by the time of Gunnar Myrdal’s 1944 book, *An American Dilemma*, “freedom of association was considered a deeply rooted characteristic of American society.”²¹

But the “deeply rooted characteristic” wasn’t evident in 1947. As the executive branch embarked on its loyalty investigations of government employees, the HUAC subpoenaed movie producers, screenwriters and directors to examine alleged communist affiliations. Hollywood personalities including Humphrey Bogart, Lauren Bacall, Groucho Marx, and Frank Sinatra formed the Committee for the First Amendment and flew to Washington to support those called to testify.²² In October of 1947, ten Hollywood witnesses refused on First Amendment grounds to answer questions from the HUAC. But the “Hollywood Ten” were largely abandoned after Congress cited them for contempt. Within a month, top Hollywood executives agreed to blacklist them, and the Committee for the First Amendment “folded almost as fast as it had formed.”²³

¹⁹Ibid., 337.

²⁰Ibid., 337, 338.

²¹Ibid., 346 (citing Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Bros., 1944).

²²Victor Navasky, *Naming Names* (New York: Viking Press, 1980), 80.

²³Ibid., 83. Hollywood executives issued the “Waldorf-Astoria Policy Statement” which announced that producers would “not knowingly employ a Communist.” Harold Horowitz, “Loyalty Tests for Employment in the Motion Picture Industry,” *Stanford Law*

One of the earliest attempts to challenge the HUAC inquiries based upon a “right of association” came after the committee cited Dr. Edward Barsky for contempt following his refusal to answer a records request. Barsky, a surgeon and national chairman of the Joint Anti-Fascist Refugee Committee, appealed his conviction to the Court of Appeals for the District of Columbia. The ACLU filed a brief on his behalf, arguing that the First Amendment prohibited “general inquiry into matters relating to opinion or affecting freedom of association.”²⁴ But Barsky lost at the Court of Appeals, and the Supreme Court declined to hear his case.²⁵

In their investigative hearings, the HUAC and the Senate Internal Security Subcommittee (SISS) routinely asked witnesses whether they were presently or had ever been a member of the Communist Party.²⁶ The question posed a Catch-22. On the one hand, witnesses who denied any affiliation could be charged with perjury based on circumstantial evidence that suggested otherwise. On the other hand, those who admitted

Review 6 (1954): 443. The *New York Times* called the statement “an action unprecedented in American industrial fields.” *Ibid.*

²⁴Walker, *In Defense of American Liberties*, 181.

²⁵*Barsky v. United States*, 167 F.2d 241 (D.D.C. 1948), *cert. denied*, 334 U.S. 843 (1948). Barsky returned to the Supreme Court six years later to challenge New York’s suspension of his medical license following his six-month prison sentence for contempt. This time, the Court took the case, but the result was no better for Barsky: the Court concluded that New York’s suspension did not violate Barsky’s due process rights under the Fourteenth Amendment. *Barsky vs. Board of Regents*, 347 U.S. 442 (1954). Douglas, Black, and Frankfurter dissented. Douglas expressed incredulity over the purported connection Barsky’s refusal to comply with the HUAC and his ability to practice medicine. *Ibid.*, 472 (Douglas, J., dissenting). Black argued that the action violated Barsky’s First Amendment rights. *Ibid.*, 455 (Black, J., dissenting). Frankfurter alleged that the suspension violated due process by unreasonably depriving Barsky of his right to earn a living. *Ibid.*, 467 (Frankfurter, J., dissenting). See also Lucas Powe Jr., *The Warren Court and American Politics* (Cambridge: Belknap Press, 2000), 80-81.

²⁶Powe, *The Warren Court and American Politics*, 77.

a communist affiliation usually suffered adverse economic and social consequences. As a result, a growing number of witnesses refused on constitutional grounds to answer questions. Initially, most of these witnesses invoked the Fifth Amendment right against self-incrimination. But observers increasingly saw this as an admission of guilt by those they labeled “Fifth Amendment Communists.”²⁷ Accordingly, witnesses began turning to the First Amendment. As with the Hollywood Ten, reliance on the First Amendment usually resulted in contempt of Congress citations.

2. The Perceived Threat Grows

The executive and legislative actions to curtail communist activity took on added urgency in light of global events including the Berlin blockade, the first Soviet test of an atomic bomb, and Mao Tse-tung’s overthrow of Chiang Kai-Shek’s government in China.²⁸ Alger Hiss’s 1950 perjury conviction and the espionage convictions of Julius and Ethel Rosenberg the following year reinforced fears of an ongoing domestic communist threat. As Lucas Powe has written: “Americans, very much including Supreme Court justices, viewed these trials against the backdrop of communist expansion in Europe and Asia, and an aggressive anticommunism became a staple of American

²⁷Ibid., 77-78.

²⁸In 1950, with these events in mind, Congress passed the McCarran Internal Security Act, authorizing concentration camps for subversives and requiring communists to register with the Subversive Activities Control Board. 50 U.S.C. § 781, *et seq.* (1950). The Act was also known as the Subversive Activities Control Act of 1950. Registered individuals were denied employment in government, defense and labor unions. Powe, *The Warren Court and American Politics*, 77; Walker, *In Defense of American Liberties*, 198.

politics and society.”²⁹ In light of the unsettling domestic and global developments, citizens across the political spectrum welcomed the Smith Act prosecutions as a necessary defense against the spread of communism.

Sidney Hook captured the heightened fears and the growing tensions within liberalism in a popular 1950 article published in the *New York Times Magazine* titled “Heresy, Yes—But Conspiracy, No.”³⁰ Hook warned that while “[t]he liberal stands ready to defend the honest heretic no matter what his views against any attempt to curb him,” the “failure to recognize the distinction between heresy and conspiracy is fatal to a liberal civilization.”³¹ Hook drew a sharp distinction between “Communist ideas” and the “Communist movement.” The former were merely heresies, “and liberals have no fear of them where they are freely and openly expressed.”³² But the Communist movement was “something much more than a heresy.”³³ It included “native elements who by secrecy and stratagem serve the interests of a foreign power.”³⁴ Hook saw the communist plot particularly at work in labor organizations and schools. In language that foreshadowed some of the Supreme Court’s rhetoric, he maintained that: “It is not his

²⁹Ibid., 15.

³⁰Sidney Hook, “Heresy, Yes—But Conspiracy, No,” *New York Times*, July 9, 1950, p. SM7. Hook’s similarly titled book published three years later became “one of the most prominent mid-century works reflecting seriously on questions relating to the freedom of association.” Kersch, “‘Guilt By Association’” and the Postwar Civil Libertarians,” 65. Hook’s book is Sidney Hook, *Heresy Yes; Conspiracy, No* (New York: John Day & Co., 1953).

³¹Hook, “Heresy, Yes—But Conspiracy, No.”

³²Ibid.

³³Ibid.

³⁴Ibid.

beliefs, right or wrong; it is not his heresies, which disqualify the Communist party teacher but his declaration of intention, as evidenced by official statements of his party, to practice educational fraud.”³⁵ Policing the schools against communists was “a matter of ethical hygiene, not of politics or of persecution.”³⁶

3. *The Supreme Court Speaks*

The first indication of the Supreme Court’s complicity in the communist scare came in its 1950 decision, *American Communications Association v. Douds*.³⁷ *Douds* involved a challenge to the Taft-Hartley amendments to the National Labor Relations Act (NLRA), which required that union officers submit affidavits disavowing membership in or support of the Communist Party before a union could receive the NLRA’s protections.³⁸ The Court upheld the affidavit requirement. Chief Justice Vinson reasoned that the Act protected the country from “the so-called ‘political strike.’”³⁹ He referred to “substantial amounts of evidence” presented to Congress “that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in

³⁵ *Ibid.*

³⁶ *Ibid.* Christopher Phelps suggests that Hook’s writing “became perhaps the most influential justification for firing Communists and suspected Communists from universities and schools in the early 1950s.” Christopher Phelps, *Young Sidney Hook: Marxist and Pragmatist* (Ithaca: Cornell University Press, 1997), 119.

³⁷ *American Communications Association v. Douds*, 339 U.S. 382 (1950).

³⁸ 61 Stat. 136, 146, 29 U. S. C. (Supp. III) § 141, § 159 (h), *amending* National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*

³⁹ *Ibid.*, 388.

support of the policies of a foreign government.”⁴⁰ Although recognizing “[t]he high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end,” Vinson concluded that the Act reflected “legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct.”⁴¹ Just five years earlier, the Court had noted the “preferred place” of the freedom of assembly in *Thomas v. Collins*.⁴² In that case, Justice Rutledge had concluded that “the great, the indispensable democratic freedoms secured by the First Amendment” meant that only “the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”⁴³ *Douds* made no mention of *Thomas*’s preferred place doctrine but instead invoked “the deference due to the legislative determination of the need for restriction upon particular forms of conduct.”⁴⁴

The weakening of associational protections continued in *Dennis v. United States*,⁴⁵ which ACLU national chairman Roger Baldwin later called “the worst single

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, 399.

⁴² *Thomas v. Collins*, 323 U.S. 516, 530-31 (1945). *Cf. United States v. Congress of Industrial Organizations*, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring) (legislative judgment “does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment.”).

⁴³ *Thomas v. Collins*, 530-31. Rutledge’s opinion also noted that the right of assembly guarded “not solely religious or political” causes but also “secular causes,” great and small. *Ibid.*

⁴⁴ *Douds*, 401.

⁴⁵ *Dennis v. United States*, 341 U.S. 494 (1951).

blow to civil liberties in all our history.”⁴⁶ *Dennis* came to the Court after FBI director J. Edgar Hoover initiated Smith Act prosecutions of twelve senior leaders of the Communist Party of the United States of America (CPUSA).⁴⁷ The government charged the defendants with violating the Act’s membership clause, which made it unlawful “to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence, or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.”⁴⁸ The government construed the Act so broadly that it “made no effort to prove that this attempted overthrow was in any sense imminent, or even in the concrete planning stages.”⁴⁹ Following a nine-month trial, the jury convicted all twelve defendants after less than a day of deliberation.⁵⁰

Vinson’s plurality opinion in *Dennis* recounted the speech-protective views of Holmes and Brandeis and conceded that “there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.”⁵¹ But Vinson refashioned Holmes’s clear and present danger standard, concluding that with respect to the CPUSA,

⁴⁶Walker, *In Defense of American Liberties*, 187. Cf. Martin H. Redish, *The Logic of Persecution: Free Expression and the McCarthy Era* (Stanford: Stanford University Press, 2005), 81 (describing *Dennis* as “one of the most troubling free speech decisions ever handed down by the United States Supreme Court”).

⁴⁷Redish, *The Logic of Persecution*, 81-82.

⁴⁸18 U.S.C. § 2385 (1948).

⁴⁹Redish, *The Logic of Persecution*, 83.

⁵⁰*Ibid.*, 82, 87.

⁵¹*Dennis*, 507.

“it is the existence of the conspiracy which creates the danger.”⁵² Justice Black’s dissent lamented that:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.⁵³

As Black anticipated, *Dennis* generated little public outcry, and even liberals like Norman Thomas and Arthur Schlesinger supported the decision.⁵⁴ One of the lone openly critical voices was Eleanor Roosevelt, who wrote the day after the decision: “I am not sure our forefathers—so careful to guard our rights of freedom of speech, freedom of thought and freedom of assembly—would not feel that the Supreme Court had perhaps a higher obligation . . .”⁵⁵ Roosevelt spent the following two summers touring criticizing *Dennis* in public forums with Justice Douglas, an endeavor that at times met with hostility.⁵⁶

4. *The Second Red Scare*

Dennis opened the floodgates for additional FBI investigations and prosecutions. The Justice Department began pursuing “second-string” CPUSA leadership and over the

⁵²Ibid., 511. Milton Konvitz quipped that Vinson’s interpretation of Holmes and Brandeis was “doctrine reduced to a phrase.” Milton R. Konvitz, *Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly* (Ithaca: Cornell University Press, 1957): 307.

⁵³*Dennis*, 581 (Black, J., dissenting).

⁵⁴Allida M. Black, *Casting Her Own Shadow: Eleanor Roosevelt and the Shaping of Postwar Liberalism* (New York: Columbia University Press, 1996): 155.

⁵⁵Ibid., 154.

⁵⁶Ibid., 155. Black reports that “the furor [Roosevelt’s] stance generated cut into her lecture tour and deprived her of income she needed.” Ibid.

next few years charged 126 communists with conspiracy under the Smith Act.⁵⁷ Paul Robeson, W.E.B. Du Bois, Lewis Mumford, Eleanor Roosevelt, and Henry Steele Commager launched sporadic efforts to halt the prosecutions or obtain amnesty for defendants.⁵⁸ But widespread public concern for the accused never materialized, and the government routinely won even its weakest cases.⁵⁹

The anti-communist concerns also pervaded state legislation. In 1953, the Court reviewed a speech and assembly challenge to a New York law that denied employment in its public schools to any person who advocated the violent overthrow of the government or who joined a society or group of persons knowing that it advanced such advocacy.⁶⁰ The law took aim at “members of subversive groups, particularly of the Communist Party and its affiliated organizations” who had been “infiltrating into public employment in the public schools of the State.”⁶¹ In passing the restrictive statute, the New York legislature had found that “the members of such groups use their positions to advocate and teach their doctrines . . . without regard to truth or free inquiry” in ways “sufficiently subtle to escape detection in the classroom.”⁶² In *Adler v. Board of Education*, a 6-3 majority

⁵⁷Michael R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport: Greenwood Press, 1977), 156.

⁵⁸*Ibid.*, 157.

⁵⁹*Ibid.*, 157-58.

⁶⁰*Adler v. Board of Education*, 342 U.S. 485 (1952).

⁶¹*Ibid.*, 489.

⁶²*Ibid.*, 489-90.

concluded that New York had acted “in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.”⁶³

Nine months after *Adler*, the Court finally set limits on anti-communist legislation. Justice Clark’s majority opinion in *Wieman v. Updegraff* struck down an Oklahoma statute that required state employees to affirm, among other things, that they had not within the last five years “been a member of . . . any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization.”⁶⁴ Clark distinguished *Adler* by emphasizing that the New York law had required a person to have *known* the purposes of the society or group that he or she had joined. In contrast, Oklahoma’s law mandated that “the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly.”⁶⁵

Frankfurter’s concurrence in *Wieman* referred to “a right of association peculiarly characteristic of our people.”⁶⁶ That same year, Thomas Emerson and David Haber’s

⁶³*Ibid.*, 493. The Court’s rhetoric is astounding. Black, Douglas, and Frankfurter filed separate dissents. Black protested the Court’s endorsement of a law “which effectively penalizes school teachers for their thoughts and their associates.” *Ibid.*, 497 (Black, J., dissenting). Douglas refused to accept “the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights.” *Ibid.*, 508 (Douglas, J., dissenting). Frankfurter’s lengthy dissent rested largely on procedural grounds. *Ibid.*, 497 (Frankfurter, J., dissenting).

⁶⁴*Wieman v. Updegraff*, 344 U.S. 183, 186 (1952).

⁶⁵*Ibid.*, 191.

⁶⁶*Ibid.*, 195 (Frankfurter, J., concurring) (citation omitted). The Court had briefly referred to a “freedom of association” in *Douglas*. 409 (“the effect of [a] statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts in determining whether the balance struck by

treatise, *Political and Civil Rights in the United States*, contended that the “right of association is basic to a democratic society.”⁶⁷ Emerson and Haber asserted that association “embraces not only the right to form political associations but also the right to organize business, labor, agricultural, cultural, recreational and numerous other groups that represent the manifold activities and interests of a democratic people.”⁶⁸

5. Harlan and Brennan Join the Court

In the midst of the Second Red Scare and initial glimpses of a right of association, two men who would deeply influence the development of that right joined the Supreme Court: John Harlan and William Brennan. Brennan, who succeeded Sherman Minton in 1956, became the chief intellectual architect of the Warren Court’s civil liberties activism and arguably “the most important jurist of the second half of the century.”⁶⁹ His tenure on the Court included the first official recognition of the right of association in *NAACP v. Alabama* and its transformation in the opinion he wrote twenty-six years later in *Roberts v. United States Jaycees*. Harlan, who replaced Robert Jackson in 1955, authored the Court’s opinion in *NAACP v. Alabama*. His role on the Court is often cast as

Congress comports with the dictates of the Constitution”). The Court’s only mention of a right of association prior to *Douglas* had been a passing reference to “the rights of free speech, assembly, and association” in *Whitney v. California*, 274 U.S. 357, 371 (1927).

⁶⁷Thomas I. Emerson and David Haber, *Political and Civil Rights in the United States* (Buffalo: Dennis, 1952), 248.

⁶⁸Ibid. Emerson and Haber wrote that “it is generally accepted that the rights in the First Amendment to freedom of speech, press and assembly, and to petition the government for redress of grievances, taken in combination, establish a broader guarantee to the right of political association.” Ibid.

⁶⁹Powe, *The Warren Court and American Politics*, 90.

“conservative” based on his close relationship with Felix Frankfurter, his predilection for judicial restraint and deference to national security decisions by government officials, and his constant sparring with the Warren Court liberals. But this label obscures the complexity of his thought.⁷⁰ Even in his first few months on the Court, Harlan expressed discomfort over Smith Act prosecutions and associational restrictions on communists and let slip that he had little patience for “McCarthyite garbage.”⁷¹

Harlan’s constitutional hermeneutic proved even more important in shaping the right of association than his concerns about the communist prosecutions. He believed that the “full scope” of the liberty of the Due Process Clause of the Fourteenth Amendment could not be “found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.”⁷² For Harlan, the meaning of constitutional law was “one not of words, but of history and purposes.”⁷³ This required an appropriate balancing of past tradition and present reform:

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not

⁷⁰At a 1972 memorial service for Harlan, Justice Stewart quipped: “I can assure you that a very interesting law review article could someday be written on ‘The Liberal Opinions of Mr. Justice Harlan.’” Norman Dorsen, “John Marshall Harlan,” in *The Warren Court: A Retrospective*, ed. Bernard Schwartz (New York: Oxford University Press, 1996) 241.

⁷¹Tinsley E. Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* (New York: Oxford University Press, 1992), 338 (quoting Charles Fried). Frankfurter, too, “privately deplored the excesses of McCarthyism and the witch-hunts conducted in the name of national security,” and “risked personal opprobrium in his defense of some of the accused.” Urofsky, *Felix Frankfurter*, 105.

⁷²*Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

⁷³*Ibid.*, 542-43.

long survive, while a decision which builds on what has survived is likely to be sound.⁷⁴

These views about liberty and tradition gave Harlan an openness to the kind of arguments that would later be advanced to secure the right of association.

6. *Red Monday*

On Monday, June 17, 1957, with Brennan and Harlan now in place, the Court released a quartet of decisions curtailing the government's anti-communist efforts in what became known as "Red Monday."⁷⁵ Three of the decisions checked actions by the federal government. *Service v. Dulles* ordered the reinstatement of a federal government employee who had been dismissed based on loyalty concerns.⁷⁶ *Watkins v. United States* reversed John Watkins's contempt conviction following his refusal on First Amendment grounds to respond to questions from the HUAC about his alleged communist affiliations.⁷⁷ *Yates v. United States*, the most important of the three decisions against the federal government, involved the appeal of fourteen leaders of the Communist Party in California convicted under the Smith Act.⁷⁸ Harlan's majority opinion distinguished

⁷⁴*Ibid.*, 542.

⁷⁵Following the decisions, outraged conservatives in the Senate led by William Jenner of Indiana introduced a "court-stripping" bill to deprive the Court of certain subject matter jurisdiction.

⁷⁶*Service v. Dulles*, 354 U.S. 363 (1957).

⁷⁷*Watkins v. United States*, 354 U.S. 178 (1957). The Court noted that the First Amendment could be invoked against investigating committees but resolved the case as a violation of procedural due process under the Fifth Amendment. *Ibid.*, 215. Watkins "amounted to little more than the imposition of a rather minimal constitutional restraint." Redish, *The Logic of Persecution*, 41.

⁷⁸*Yates v. United States*, 354 U.S. 298 (1957).

between advocacy of forcible overthrow of the government as an “abstract principle” on the one hand and “advocacy or teaching of action” on the other.⁷⁹ Based on this standard, the Court directed that five of the convictions be overturned outright and the other nine remanded for retrial. More importantly, Harlan’s statutory interpretation effectively limited future Smith Act prosecutions.⁸⁰

The fourth Red Monday decision, *Sweezy v. New Hampshire*, involved state rather than federal action.⁸¹ Paul Sweezy, a well-known Marxist economist and founder of the *Monthly Review*, had been subpoenaed by the New Hampshire attorney general to testify about alleged communist affiliations.⁸² Like Watkins, Sweezy refused to answer certain questions on First Amendment grounds. The Superior Court of Merrimack County, New Hampshire, found him in contempt and ordered his imprisonment. The New Hampshire Supreme Court upheld his conviction despite its assertion that “the right to associate with others for a common purpose, be it political or otherwise,” was one of the “individual liberties guaranteed to every citizen by the State and Federal Constitutions.”⁸³ Chief Justice Warren’s plurality opinion reversed the conviction, concluding that New

⁷⁹*Ibid.*, 318-320. See Yarbrough, *John Marshall Harlan*, 191; Walker, *In Defense of American Liberties*, 243; Powe, *The Warren Court and American Politics*, 94-95.

⁸⁰See Walker, *In Defense of American Liberties*, 243 (*Yates* “halted further Smith Act prosecutions”); Yarbrough, *John Marshall Harlan*, 191 (“Following [*Yates*], Smith Act prosecutions were drastically curtailed, then abandoned entirely.”).

⁸¹*Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (plurality opinion).

⁸²N.H. Rev. Stat. Ann.1955, c. 588, §§ 1-16 (New Hampshire Subversive Activities Act of 1951).

⁸³*Wyman v. Sweezy*, 100 N. H. 103, 113 (N.H. 1956).

Hampshire's statute impermissibly extended to "conduct which is only remotely related to actual subversion."⁸⁴

7. *Sweezy, Liberty, and Penumbras*

Sweezy also brought to the foreground an important legal question about the right of association: its constitutional source. Thomas Emerson, who represented *Sweezy* before the Court, noted that the New Hampshire Supreme Court had referred to "speech and association" rights in its review of *Sweezy*'s conviction. But Emerson also recognized that the New Hampshire court had cited only "the Federal Constitution" as its basis for these rights.⁸⁵ Emerson offered two more specific possibilities. First, he argued that New Hampshire's law deprived *Sweezy* "of liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States."⁸⁶ Second, he wrote that "it can hardly be doubted that the requirements of the First Amendment, made applicable to the states through the Fourteenth Amendment, impose comparable or identical limits on state power."⁸⁷ The differences between these arguments may seem like hairsplitting to non-lawyers, but they reflect an important

⁸⁴*Sweezy*, 247. Warren paid particular attention to *Sweezy*'s role as a university professor, noting that "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust" and "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Ibid.*, 250.

⁸⁵*Sweezy v. New Hampshire*, Jurisdictional Statement of Appellant, filed June 19, 1956 ("Jurisdictional Statement"), 27.

⁸⁶*Ibid.*, 4.

⁸⁷*Ibid.*, 19.

doctrinal divide that complicated the Court's efforts to settle on a jurisprudential framework for the right of association.⁸⁸

The disagreement centered on how rights located in the federal Constitution could limit *state* action. The Supreme Court had initially concluded that the substantive provisions of the Bill of Rights limited only the federal government and did not apply to the states.⁸⁹ But after the Civil War, the Fourteenth Amendment's Due Process Clause had established—in language similar to the Fifth Amendment—that states could not “deprive any person of life, liberty, or property, without due process of law.”⁹⁰

Whether the liberty of the Fourteenth Amendment encompassed specific provisions in the Bill of Rights remained unclear at the time of *Sweezy*. In 1922, Justice Pitney had written for a majority of the Court that “[n]either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about the freedom of speech.”⁹¹ But three years later, Justice Sanford concluded in *Gitlow v. New York* that “we may and do assume that freedom of speech

⁸⁸These arguments weren't at issue in *Scales*, *Watkins*, and *Dulles*, all of which involved federal rather than state action.

⁸⁹See *Barron v. Mayor and City Council of City of Baltimore*, 32 U.S. 243 (1833).

⁹⁰*U.S. Constitution*, Amendment XIV. This clause restricted state action that deprived “liberty” without due process, but it remained to be seen what exactly that encompassed. Soon after the passage of the Fourteenth Amendment, the Court focused on a different provision of the Bill of Rights, the Privileges and Immunities Clause. In the *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873), the Court intimated that the Bill of Rights might be applicable to the states through the Fourteenth Amendment as “privileges and immunities” of citizenship. This is the theory that Justice Roberts relied upon to hold the freedom of assembly applicable to Mayor Hague's actions in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939). But outside of *Hague*, the Court has usually cited the Due Process Clause rather than the Privileges and Immunities Clause in applying the rights of the First Amendment to state action.

⁹¹*Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (1922).

and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”⁹²

Gitlow made clear that states, like the federal government, could not “impair” the freedoms of speech and press, but the decision left open to interpretation the source of those restrictions. Twelve years later, Justice Cardozo suggested two possibilities in *Palko v. Connecticut*: (1) that certain provisions from the Bill of Rights had been “brought within the Fourteenth Amendment by a process of absorption;”⁹³ and (2) that restrictions against the federal government from “the specific pledges of particular amendments” were “implicit in the concept of ordered liberty” and thereby valid against the states through the Fourteenth Amendment.⁹⁴ Restating Cardozo’s alternatives suggests the following two possibilities:

(1) The *incorporation argument*, which holds that the due process clause of the Fourteenth Amendment incorporated the specific rights enumerated in the First Amendment, thereby making those rights applicable to the states; and

⁹²*Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁹³*Palko v. Connecticut*, 302 U.S. 319, 326 (1937). Cardozo continued that: “These, in their origin, were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor Justice would exist if they were sacrificed.” *Ibid.*

⁹⁴*Ibid.*, 324-25 (citations omitted). Later that year, Chief Justice Hughes reached a similar conclusion about the right of assembly in *De Jonge v. Oregon*: “The First Amendment of the Federal Constitution expressly guarantees [the right of assembly] against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.” *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

(2) The *liberty argument*, which holds that rights similar to those in the First Amendment were implicit in the liberty protected by the due process clause of the Fourteenth Amendment and could thus be derived independently of the First Amendment.

Douglas, Black, and Frankfurter had sparred over the differences between the incorporation argument and the liberty argument well before *Sweezy*. In 1943, Douglas's majority opinion in *Murdock v. Pennsylvania* referred without elaboration to "[t]he First Amendment, which the Fourteenth makes applicable to the states."⁹⁵ Four years later, Black's majority opinion in *Everson v. Board of Education* echoed the same language.⁹⁶ Frankfurter dissented in both cases. He didn't see anything in the text of the Fourteenth Amendment that applied the Bill of Rights to the states. Two years later, he rebuffed Douglas and Black in his majority opinion in *Wolf v. Colorado*: "[t]he notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution, and thereby incorporates them, has been rejected by this Court again and again, after impressive consideration. . . . The issue is closed."⁹⁷

Black and Douglas disagreed with Frankfurter not only about the *source* of the constitutional limits on state action but also about the *extent* of those limits. Black saw the rights in the First Amendment as "absolute" and impervious to restriction by state action. Douglas did not always go that far, but he argued in *Murdock* that the freedoms of the First Amendment held a "preferred position."⁹⁸ Frankfurter considered the

⁹⁵*Murdock v. Pennsylvania*, 319 U. S. 105, 108 (1943).

⁹⁶*Everson v. Board of Education*, 330 U. S. 1, 8 (1947).

⁹⁷*Wolf v. Colorado*, 338 U.S. 25, 26 (1949). Black concurred and Douglas dissented, arguing that entirety of Fourth Amendment applied to the states.

⁹⁸*Murdock*, 108. Rutledge had used the same language with respect to the freedom of assembly in *Thomas v. Collins*, 530-31. Black and Douglas didn't share the exact same

preferred position language a “mischievous phrase” that expressed “a complicated process of constitutional adjudication by a deceptive formula” and implied “that any law touching communication is infected with presumptive invalidity.”⁹⁹ He argued instead for a “balancing” that weighed the interests of the government against the liberty of the Fourteenth Amendment. On this view, Frankfurter would defer to a legislative judgment if a restriction of speech or assembly had a “rational basis.” Justice Jackson described the tension between the two positions in his 1943 opinion in *West Virginia v. Barnette*:

In weighing arguments of the parties, it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a “rational basis” for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.¹⁰⁰

views about incorporation. Douglas joined Black’s dissent in *Adamson v. California*, which argued that the Fourteenth Amendment had incorporated *all* of the civil liberties provisions of the Bill of Rights. *Adamson v. California*, 332 U. S. 46, 71-72 (1947) (Black J., dissenting). But elsewhere Douglas backed away from Black’s “total incorporation” theory.

⁹⁹*Kovacs v. Cooper*, 336 U.S. 77, 90, 95-96 (1949) (Frankfurter, J., concurring).

¹⁰⁰*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).

The upshot of these two perspectives was that the Court would be more likely to uphold a state law restricting speech or assembly if it followed the liberty argument and more likely to strike down the law if it followed the incorporation argument.¹⁰¹

Sweezy added a new wrinkle: unlike the rights of speech, press, and assembly at issue in earlier cases, the right of association appeared nowhere in the Constitution. Under the liberty argument, association (like any other right enforced against the states) was implicit in the liberty of the Fourteenth Amendment. The incorporation argument faced a greater hurdle because it claimed that the Fourteenth Amendment relied upon provisions found in the First Amendment. The only possible explanation to support the incorporation argument was that a right implicit in the First Amendment implicitly applied to states through the Fourteenth Amendment. That was one more degree of inference than the liberty argument. Penumbras formed by emanations, as Douglas would later characterize it.¹⁰²

Emerson was well aware of the doctrinal divide that *Sweezy* presented, and he straddled the line by making both the liberty argument and the incorporation argument. Chief Justice Warren's plurality opinion (joined by Douglas, Black, and Brennan) relied on the incorporation argument: "the right to engage in political expression and association . . . was enshrined in the First Amendment."¹⁰³ Frankfurter, joined by Harlan, concurred only in the result. In Frankfurter's view, the justices were confined to "the

¹⁰¹There were, of course, phrasings ambiguous enough to be consistent with both alternatives. See, e.g., *Staub v. City of Baxley*, 355 U.S. 313, 325 (1958) (the "fundamental right [of speech] is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from invasion by state action").

¹⁰²See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹⁰³*Sweezy*, 250.

limited power to review the action of the States conferred upon the Court by the Fourteenth Amendment.”¹⁰⁴ The Court’s role was “the narrowly circumscribed but exceedingly difficult task of making the final judicial accommodation between the competing weighty claims that underlie all such questions of due process.”¹⁰⁵ Frankfurter made no reference to the First Amendment but relied instead upon “‘the concept of ordered liberty’ implicit in the Due Process Clause of the Fourteenth Amendment.”¹⁰⁶ His concurrence rested upon “a judicial judgment in balancing two contending principles—the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection.”¹⁰⁷

B. *NAACP v. ALABAMA*

The divide between the liberty argument and the incorporation argument persisted when the Court squarely addressed the constitutional right of association the following year in *NAACP v. Alabama*, a case that shifted the Court’s focus on group autonomy from the government’s anti-communist efforts to the civil rights movement in the South.

¹⁰⁴Ibid., 255-56 (Frankfurter, J., concurring).

¹⁰⁵Ibid., 256.

¹⁰⁶Ibid., 266 (quoting *Palko*, 325).

¹⁰⁷Ibid., 266-267. Justice Clark’s dissent erroneously concluded that Frankfurter concurred “on the ground that Sweezy’s rights under the First Amendment had been violated.” Ibid., 268 (Clark, J., dissenting).

1. *The Growing Civil Rights Movement*

The proximity between a waning but still active concern over domestic communism and the expanding civil rights movement led to widely divergent claims about the relationship between the two. On the one hand, the federal government increasingly viewed segregation as undercutting its stance against communist ideology. Its amicus brief in *Brown v. Board of Education*¹⁰⁸ argued that “[t]he United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man,” and segregation jeopardized “the effective maintenance of our moral leadership of the free and democratic nations of the world.”¹⁰⁹ This view prevailed in the northern media as well. The *New York Times* described *Brown* as a “blow to communism.”¹¹⁰ The *Washington Post* added that with *Brown*, “America is rid of an incubus which impeded and embarrassed it in all of its relations with the world.”¹¹¹

In contrast to these attempts to link integration with democracy, southern conservatives argued that integration advocates were controlled by communist forces. The charges were not entirely surprising: segregationists had associated communism and black activism since the turn of the century and the early days of the NAACP.¹¹² In the

¹⁰⁸*Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁰⁹Powe, *The Warren Court and American Politics*, 35 (quoting *Brown v. Board of Education*, Amicus Brief of the United States of America).

¹¹⁰*Ibid.* (quoting *New York Times*, May 18, 1954, at 19).

¹¹¹“Equal Education for All,” *Washington Post*, May 19, 1954, p. 19.

¹¹²Jeff Woods, *Black Struggle, Red Scare: Segregation and Anti-Communism in the South, 1948-1968* (Baton Rouge: Louisiana State University Press, 2004), 49 (citing Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities*

1930s, this link between “red” and “black” had solidified in the minds of many southerners when the Communist Party’s legal arm, the International Labor Defense, undertook the celebrated defenses of Angelo Herndon and the “Scottsboro Boys.”¹¹³ But the “southern red scare” of the 1950s pressed the connections between these two “radical” movements beyond the realm of plausibility.¹¹⁴ And while segregationists “never found any good evidence that Communists had a perceptible influence in the NAACP,” they nevertheless perpetuated a link “to discredit the civil rights movement by associating it with the nation’s greatest enemy.”¹¹⁵

Warren’s *Brown* opinion sparked further efforts to steer anti-communist sentiment toward civil rights activists. His famous footnote eleven cited four non-legal sources—including Myrdal and two other authors who had “what passed for communist leanings

Organizing for Change (New York: Free Press, 1984), 26-33). See also the discussion of this era in Chapter 1.

¹¹³See Charles H. Martin, *The Angelo Herndon Case and Southern Justice* (Baton Rouge: Louisiana State University Press, 1976), xii.

¹¹⁴Neil McMillen asserts that “the region had virtually no Communists.” Neil R. McMillen, *The Citizens' Council: Organized Resistance to the Second Reconstruction, 1954-64* (Urbana: University of Illinois Press, 1971), 193. But see *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 580 (1963) (Harlan J. dissenting) (“it is not amiss to recall that government evidence in Smith Act prosecutions has shown that the sensitive area of race relations has long been a prime target of Communist efforts at infiltration”). In 1950, the NAACP adopted an “anti-communism” resolution that acknowledged that “certain branches of the National Association for the Advancement of Colored People are being rocked by internal conflicts between groups who follow the Communist line and those who do not, which threaten to destroy the confidence of the public in the Association and which will inevitably result in its eventual disruption” and “there is a well organized, nationwide conspiracy by Communists either to capture or split and wreck the NAACP.” *Ibid.*, 580, 581 (quoting Statement from Forty-First Convention of the National Association for the Advancement of Colored People).

¹¹⁵Woods, *Black Struggle, Red Scare*, 5, 53.

during that era.”¹¹⁶ Collectively, the footnote citations “reduced both the legal and moral force” of the opinion and gave segregationists additional fodder for their arguments.¹¹⁷ In response to the decision, Georgia’s lieutenant governor denounced the “meddlers, demagogues, race baiters, and communists who are determined to destroy every vestige of State’s Rights.”¹¹⁸ Mississippi Senator James Eastland, who at the time chaired both the Senate Judiciary Committee and the SISS, argued that the Court in *Brown* had “responded to a radical, pro-Communist political movement in this country.”¹¹⁹ Eastland, Arkansas senator John McClellan, and Louisiana representative Edwin Willis used their positions on the SISS, HUAC, and other investigative subcommittees to hold public hearings on “Communist influence in civil rights protests.”¹²⁰

One of the most forceful advocates of the link between communism and civil rights in the South was Mississippi Circuit Court Judge Tom P. Brady. Lucas Powe writes that “Brady saw *Brown* as a virtual communist plot to mandate the amalgamation of the races.”¹²¹ The summer after the Court’s decision, Brady spearheaded the creation

¹¹⁶Powe, *The Warren Court and American Politics*, 42.

¹¹⁷*Ibid.*, 44.

¹¹⁸*Ibid.*, 39.

¹¹⁹McMillen, *The Citizens’ Council*, 195. Eastland followed this with a frontal assault in a publication called “Is the Supreme Court Pro-Communist?” *Ibid.*, 195-96. Another segregationist, Medford Evans, wrote that “[f]orced integration is communism in action.” *Ibid.*, 197.

¹²⁰Woods, *Black Struggle, Red Scare*, 5. Eastland was “one of the era’s leading racists” and dubbed by *Time* magazine as “the nation’s most dangerous demagogue.” Robert Sherrill, *First Amendment Felon: The Story of Frank Wilkinson, his 132,000-page FBI File and his Epic Fight for Civil Rights and Liberties* (New York: Nation, 2005), 157.

¹²¹Powe, *The Warren Court and American Politics*, 68.

of the Citizens Councils, which purported to be a “nonviolent alternative to the Ku Klux Klan” that would ensure economic ruin to anyone supporting integration.¹²² According to Neil McMillen, “the nexus between the NAACP and the international Communist apparatus was the central motif of literally hundreds of Council speeches and publications.”¹²³

In late 1954 and early 1955, Citizens Councils sprang up across Alabama. From October to December 1955 alone, membership in the Alabama Councils grew from “a few hundred to twenty thousand.”¹²⁴ The Councils made clear their intentions to bury civil rights advocates in Alabama with economic and social pressures:

The white population in this country controls the money, and this is an advantage that the council will use in a fight to legally maintain complete segregation of the races. We intend to make it difficult, if not impossible, for any Negro who advocates desegregation to find and hold a job, get credit or renew a mortgage.¹²⁵

This background is critical to understanding the importance of the membership lists at issue in *NAACP v. Alabama*: once the names of NAACP members became public, the Citizens Councils would ensure swift and dire consequences.¹²⁶

¹²²Ibid. Brady was careful to make a clear distinction between the councils and the “nefarious Ku Klux Klans.” McMillen, *The Citizens’ Council*, 18.

¹²³McMillen, *The Citizens’ Council*, 198. Brady told one Council gathering that the NAACP “was a willing and ready tool in the hands of Communist front organizations.” *NAACP v. Alabama*, Brief Supporting Petition for Certiorari (“NAACP Cert Brief”), 21 n.20 (citing Brady comments made on June 22, 1955.)

¹²⁴Powe, *The Warren Court and American Politics*, 68.

¹²⁵NAACP Cert Brief at 20 (quoting Southern School News, Vol I., No. 5, p. 2).

¹²⁶See Powe, *The Warren Court and American Politics*, 68, 165.

2. Membership Lists and the Right of Association

The background to *NAACP v. Alabama* began in June of 1956, when Alabama Attorney General John Patterson initiated an action to enjoin the NAACP from operating within the state.¹²⁷ The state court trial judge issued the injunction *ex parte*, explaining that he intended “to deal the NAACP a mortal blow from which they shall never recover.”¹²⁸ The judge also ordered the NAACP to produce its membership list, which Patterson had requested as part of a records review. Knowing what this disclosure would mean given the activity of the Citizens Councils, the NAACP refused. The judge responded with a \$10,000 contempt fine, which he increased to \$100,000 five days later. After the Alabama Supreme Court rejected the NAACP’s appeal of the judge’s order through a series of disingenuous procedural rulings, the NAACP appealed to the United States Supreme Court.

In its petition for *certiorari*, the NAACP contended that the actions of Patterson and the Alabama courts amounted to “a serious interference with essential freedom of speech, freedom of assembly, freedom of association, and the right to petition” and “an unlawful restraint by the State of Alabama of First Amendment rights.”¹²⁹ The inclusion of “association” among the First Amendment rights of speech, assembly, and petition seemed almost haphazard. The NAACP’s substantive legal arguments relied on the

¹²⁷Patterson argued that the NAACP was a “business” that had failed to register under applicable state law.

¹²⁸Powe, *The Warren Court and American Politics*, 165 (quoting Mark Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (New York: Oxford University Press, 1994), 283).

¹²⁹*NAACP v. Alabama*, Petition for Certiorari, 17, 18.

rights of speech and assembly, and the only other reference to a freedom of association in the petition made no effort to suggest its constitutional basis.

In contrast to its *cert* petition, which implicitly made the incorporation argument, the NAACP's merits brief endorsed the liberty argument: the organization and its members were "merely invoking their constitutionally protected rights of free speech and free association guaranteed under the due process clause of the Fourteenth Amendment."¹³⁰ The brief elaborated that "[t]he unimpaired maintenance of freedom of association and free speech is considered essential to our political integrity" and quoted from Frankfurter's in *Wieman* concurrence that the right of association was "peculiarly characteristic of our people."¹³¹

In its reply brief, the State of Alabama conceded the existence of a right of association. Using "association" and "assembly" interchangeably, the State contended that "[l]ike the other basic First Amendment freedoms, freedom of assembly is protected by the Fourteenth Amendment against unreasonable impairment by the states."¹³² The Court, according to the State, had "recently reaffirmed" the "constitutional status of association" in *Sweezy*.¹³³

¹³⁰NAACP Cert Brief at 21.

¹³¹*NAACP v. Alabama*, Petitioner's Brief, 22, 24 (quoting *Wieman*, 195 (Frankfurter, J., concurring)). Robert L. Carter, Thurgood Marshall, and Arthur Shores signed the brief for the NAACP. Walker reports that lawyers from the ACLU and American Jewish Congress wrote "major sections" of the brief. Walker, *In Defense of American Liberties*, 239.

¹³²*NAACP v. Alabama*, Respondent's Brief at 2.

¹³³*Ibid.*, 2 (quoting *Sweezy*, 250). Alabama insisted that the only harm articulated by the NAACP and its members was "the mere speculation of injury by private persons to its members." Respondent's Brief, 12. Citing *United States v. Cruikshank*, 92 U.S. 542

First Amendment scholar Leo Pfeffer submitted an amicus brief on behalf of a number of organizations, including the American Jewish Congress, the American Baptist Convention, the Commission on Christian Social Progress, the ACLU, and the American Veterans Committee.¹³⁴ The Court refused to consider the brief,¹³⁵ but Pfeffer's arguments are preserved in the record and illuminate the conflation of the constitutional and doctrinal concepts in the case.

Pfeffer was best known for his work on the First Amendment's religion clauses, but his 1956 book, *The Liberties of an American*, had included a section on assembly and association in which he had asserted that despite the absence of any mention of association in the Bill of Rights, "there can be little doubt that [the founding fathers] recognized the right to associate as a liberty of Americans."¹³⁶ He elaborated by drawing a distinction between association and assembly that cast assembly in a remarkably narrow role:

When men band together for a single public demonstration of feeling or expression of a grievance they exercise their right of assembly; when they continue banding and acting together until the grievance is redressed they exercise their right of association. Freedom of indefinite or permanent association is as fundamental to democracy and as much a liberty of Americans as freedom of temporary assembly, and no less entitled to constitutional protection.¹³⁷

(1875), the State contended that "[p]rivate action is not state action" and did not constitute a violation of constitutional rights. Ibid.

¹³⁴*NAACP v. Alabama*, Amicus Brief of American Jewish Congress, et al. ("Pfeffer Amicus Brief"), October 3, 1957.

¹³⁵*NAACP v. Alabama*, 355 U.S. 860 (1957) (denying motion for leave to file amicus brief).

¹³⁶Leo Pfeffer, *The Liberties of an American: The Supreme Court Speaks* (Boston: Beacon Press, 1956), 111.

¹³⁷Ibid.

But a few sentences later, Pfeffer collapsed the distinction, referring to “the right of assembly (i.e., association).”¹³⁸

In his amicus brief, Pfeffer opened by appealing both to the liberty argument and the incorporation argument:

Freedom of association is a liberty guaranteed against Federal infringement by the Fifth Amendment to the United States Constitution and against state infringement by the Fourteenth. In addition it is one of the co-equal guarantees of the First Amendment applied to the states by the Fourteenth.¹³⁹

In support of the liberty argument, Pfeffer contended that “[a] constitutional provision protecting liberty against arbitrary governmental deprivation would have little meaning if it did not encompass the freedom of men to associate with each other.”¹⁴⁰ When he explained the incorporation argument, Pfeffer exhibited the same confusion between association and assembly that he had displayed in *The Liberties of an American*. He argued on the one hand that “‘freedom of association’ may be viewed as a right to conduct indefinitely continuing assemblies.”¹⁴¹ But he also asserted that “‘freedom of assembly is not limited to occasional meetings but *includes* the organization of associations on a permanent basis.”¹⁴² This latter argument represented a third way to ground association in the Constitution:

¹³⁸Ibid.

¹³⁹Pfeffer Amicus Brief, at 8.

¹⁴⁰Ibid., 10-11.

¹⁴¹Ibid., 15.

¹⁴²Ibid. (emphasis added).

The *assembly argument*, which holds that the right of association is part of the right of assembly and is therefore accorded the same deference and applicable to the states to the same extent as the right of assembly.

The assembly argument garnered little attention from the justices (other than Black and Douglas, who raised it infrequently in later cases). But it could have linked the right of association to the doctrinal and constitutional history of the right of assembly. This is not to suggest that the right of assembly was immune to political pressure—as previously noted, the preferred position of assembly had already been attenuated by some of the early communist cases of the 1950s. But at the very least, connecting a new right of association to the existing right of assembly would have provided a more direct link to the text of the Constitution than either the incorporation argument or the liberty argument.

Oral argument in *NAACP v. Alabama* focused almost entirely on procedural and jurisdictional questions related to Alabama state law. The justices showed little interest in the freedom of association and asked no questions about its constitutional basis. NAACP attorney Robert L. Carter, who had advanced the incorporation argument in his *cert* petition and the liberty argument in his brief, now reverted back to the incorporation argument: the denial of “free speech and freedom of association” infringed upon a right “protected by the First Amendment.”¹⁴³ Alabama Assistant Attorney General Edmon Rinehart made no argument regarding the constitutional basis of association but conceded its status as an individual right.¹⁴⁴

¹⁴³*NAACP v. Alabama*, January 15, 1958 Oral Argument Tr. at 32:15.

¹⁴⁴*NAACP v. Alabama*, January 16, 1958 Oral Argument Tr. at 51:30 – 1:01:20. Rinehart instead challenged the NAACP’s attempt to assert the right as a corporation or on behalf of its members. He argued that *Watkins* and *Sweezy* had addressed assertions of individual rights, not the rights of a group. He intimated only once that the state could

The justices agreed that Alabama had infringed upon the associational rights of the members of the NAACP. After they met in conference, Warren assigned the opinion to Harlan with the understanding that it would be unsigned or *per curiam*, in keeping with the Court's practice in post-*Brown* race cases.¹⁴⁵ But Harlan soon realized that "it would reflect adversely on the Court were we to dispose of the case without a fully reasoned opinion," and his colleagues agreed to his request to write a full opinion.¹⁴⁶

Harlan's opinion for a unanimous Court framed the constitutional question in terms of the "fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment."¹⁴⁷ He began his constitutional analysis by citing *De Jonge v. Oregon*¹⁴⁸ and *Thomas v. Collins*¹⁴⁹ for the principle that: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the

constrain an individual right of association, arguing unconvincingly that a member of the NAACP asked during a hearing to confirm his membership would be required to make such a disclosure. Ibid., 1:00:20 – 1:01:13. Rinehart also argued vehemently that the right of association wasn't implicated because the case involved no state action: any adverse treatment following disclosure of membership in the NAACP would come from private persons or businesses, not the state. Ibid. For good measure, Rinehart implausibly contended that the possibility of these private actions was "pure speculation." Ibid., 55:00.

¹⁴⁵Yarbrough, *John Marshall Harlan*, 161. Yarbrough explains that these opinions "contained little explication of their rationale for a particular ruling and thus permitted various facets of the segregation issue to jell in the lower courts with limited Supreme Court intervention." Ibid.

¹⁴⁶Ibid. (quoting John M. Harlan, Memorandum for the Conference, April 22, 1958, Harlan Papers, Box 495).

¹⁴⁷*NAACP v. Alabama*, 461.

¹⁴⁸*De Jonge v. Oregon*, 299 U.S. 353 (1937).

¹⁴⁹*Thomas v. Collins*, 516.

close nexus between the freedoms of speech and assembly.”¹⁵⁰ *De Jonge* and *Thomas* had established that the freedom of assembly applied to the states through the Fourteenth Amendment, that it covered political, economic, religious, and secular matters, and that it could only be restricted “to prevent grave and immediate danger to interests which the State may lawfully protect.”¹⁵¹ Based on these precedents, Harlan could have grounded his decision in the freedom of assembly. But he instead shifted away from assembly, writing in the next sentence that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”¹⁵² The Alabama courts had constrained the “right to freedom of association” of members of the NAACP.¹⁵³ These members had a “constitutionally protected right of association” that meant they could “pursue their lawful private interests privately” and “associate freely with others in doing so.”¹⁵⁴ Writing a few years after *NAACP v. Alabama*, Thomas Emerson suggested that Harlan “initially treated freedom of association as derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them” and then “elevated freedom of association to an independent right, possessing an equal status with the other rights

¹⁵⁰*NAACP v. Alabama*, 460.

¹⁵¹*De Jonge*, 364; *Thomas*, 528 n.12.

¹⁵²*NAACP v. Alabama*, 460 (emphasis added). He then proceeded to discuss the “protected liberties” of speech and press that were “assured under the Fourteenth Amendment.” *Ibid.*, 461.

¹⁵³*Ibid.*, 462.

¹⁵⁴*Ibid.*, 463, 466.

specifically enumerated in the first amendment.”¹⁵⁵ But Harlan’s opinion is more ambiguous than Emerson suggests: it is not clear that he relied at all on the First Amendment to ground association—the opinion, in fact, never mentions the First Amendment.

3. *Unanimity Masking Division?*

Harlan’s vagueness about the source of the right of association may explain how he marshaled a unanimous opinion.¹⁵⁶ In an earlier draft that he circulated to his colleagues, Harlan had written: “[i]t is of course firmly established that the protection given by the First Amendment against federal invasion of such rights is afforded by the Due Process Clause of the Fourteenth Amendment against state action.”¹⁵⁷ Douglas and Frankfurter were both troubled by the draft language, but for opposite reasons. Frankfurter pushed Harlan to rely expressly on the liberty argument and avoid any mention of the First Amendment:

Why in heaven’s name must we, whenever some discussion under the Due Process Clause is involved, get off speeches about the First Amendment? Why can’t you . . . state in two or three sentences that to ask disclosure of membership . . . is, in the light of prior decisions, merely citing them, an invasion of the free area of activity under the Fourteenth Amendment not

¹⁵⁵Thomas I. Emerson, "Freedom of Association and Freedom of Expression," *Yale Law Journal* 74 (1964): 2.

¹⁵⁶The justices realized that “unanimity was considered crucial in racial cases.” Yarbrough, *John Marshall Harlan*, 162. Yarbrough cites letters from Erwin Griswold and Edward Corwin congratulating Harlan on the opinion. *Ibid.*, 165 n.35 (citing Erwin Griswold to John M. Harlan, July 8, 1958, Harlan Papers, Box 538; Edward S. Corwin to John M. Harlan, July 7, 1958, Harlan Papers Box 511).

¹⁵⁷*Ibid.*, 125 (quoting *NAACP v. Alabama*, Harlan opinion draft, Harlan Papers, Box 533).

overcome by any solid, as against a very tenuous, interest of the state in prying into such freedom of action by individuals . . .¹⁵⁸

Douglas, on the other hand, feared that Harlan's due process analysis diluted the First Amendment as it applied to the states:

[I]f the right of free speech is watered down by the Due Process clause of the Fourteenth Amendment and made subject to state regulation, then the police power of the state has a pretty broad area for application. If we are dealing here with something that can be regulated then I think we are in very deep water in this case, as for the life of me I do not see why a state could not have a rational judgment for believing that an organization like the NAACP was a source of a lot of trouble, friction, and unrest . . .¹⁵⁹

Douglas expressed particular concern over Frankfurter's proposed balancing approach (which Harlan had endorsed in earlier opinions): "I thought that when we dealt with these racial problems and with free speech and free assembly and religious problems we were dealing with something that is right close to the absolute."¹⁶⁰

Harlan had no affinity for Douglas's argument, but he also expressed "the most serious misgivings" about Frankfurter's advice.¹⁶¹ Nonetheless, his revised draft eliminated any reference to the First Amendment. This concerned Black, who thought

¹⁵⁸Ibid. (quoting Felix Frankfurter to John M. Harlan, April 23, 1958, Harlan Papers, Box 46).

¹⁵⁹Melvin I. Urofsky, ed., *The Douglas Letters: Selections from the Private Papers of Justice William O. Douglas*, ed. Melvin I. Urofsky (Bethesda: Adler & Adler, 1987), 198 (quoting William O. Douglas to John Marshall Harlan, April 22, 1958).

¹⁶⁰Urofsky, *The Douglas Letters*, 198. Dissenting from an opinion handed down the same day as *NAACP v. Alabama*, Douglas wrote that the liberties contained in the First Amendment include "the right to believe what one chooses, the right to differ from his neighbor, the right to pick and choose the political philosophy that he likes best, the right to associate with whomever he chooses, the right to join the groups he prefers, the privilege of selecting his own path to salvation." *Beilan v. Board of Public Education*, 357 U.S. 399, 412-13 (1958) (Douglas, J., dissenting).

¹⁶¹Yarbrough, *John Marshall Harlan*, 126-27.

that the opinion now read “as though the First Amendment did not exist.”¹⁶² Black notified Harlan that he planned on submitting a brief concurrence to specify “that the state has here violated the basic freedoms of press, speech and assembly, immunized from federal abridgement by the First Amendment, and made applica[ble] as a prohibition against the states by the Fourteenth Amendment.”¹⁶³ But six days later, he relented, writing to Harlan that while he “would prefer our holding be supported by different reasoning,” he realized that doing so would prevent the unanimous decision so important to the Court in cases involving questions of race.¹⁶⁴

In the midst of satisfying Frankfurter, Douglas, and Black, Harlan had one other hurdle to clear in his opinion. The State of Alabama had argued that the Court was bound by *Bryant v. Zimmerman*, the 1928 case in which an 8-1 majority had upheld a New York registration and membership disclosure law against a challenge from a member of the Ku Klux Klan.¹⁶⁵ *Bryant* had given short shrift to the assertion of a Fourteenth Amendment due process liberty right “of membership in the association,” concluding that this right “must yield to the rightful exertion of the police power.”¹⁶⁶ The Court had noted that:

There can be no doubt that under that power the State may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits

¹⁶²*Ibid.*, 126 (quoting Hugo L. Black to John M. Harlan, May 2, 1958, Harlan Papers, Box 46).

¹⁶³*Ibid.*

¹⁶⁴Yarbrough, *John Marshall Harlan*, 162. Clark threatened to dissent on procedural grounds, but Frankfurter persuaded him to join the majority on the merits. *Ibid.*, 162, 163.

¹⁶⁵*Bryant v. Zimmerman*, 278 U.S. 63 (1928). See the discussion of *Bryant* in Chapter 1.

¹⁶⁶*Ibid.*, 72.

which are consistent with the rights of others and the public welfare. . . . [R]equiring [membership lists] to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required.¹⁶⁷

This broad deference to police power, with explicit approval of the public disclosure of the Klan's membership list, may have prompted Douglas's concern that it would be difficult to distinguish *Bryant* if Harlan resolved *NAACP v. Alabama* under the liberty argument. Harlan concluded that *Bryant* "was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence."¹⁶⁸ Relying on the "markedly different considerations in terms of the interest of the State in obtaining disclosure" Harlan distinguished *Bryant* without overruling it.¹⁶⁹ That distinction—based on the nature of the group rather than the nature of the restriction—combined with Harlan's nebulous final wording towing an ambiguous middle line to appease the concerns raised by Frankfurter, Douglas and Black, left uncertain the precise constitutional basis for association and its applicability in other contexts.

C. ASSOCIATION AFTER *NAACP v. ALABAMA*

It was clear that *NAACP v. Alabama* had broken new constitutional ground, but specifying exactly what had taken place proved elusive. The *Washington Post*

¹⁶⁷Ibid.

¹⁶⁸*NAACP v. Alabama*, 466. Harlan also attempted a less plausible distinction, noting that "the situation before us is significantly different from that in *Bryant*, because the organization there had made no effort to comply with any of the requirements of New York's statute but rather had refused to furnish the State with any information as to its local activities." Ibid., 465-66.

¹⁶⁹Ibid., 465.

editorialized that the Court had “cut through the flummery of Alabama’s treatment of the NAACP and dealt with it as an outright violation of the freedom of *assembly*.”¹⁷⁰ The *New York Times* suggested that the Court had relied on the liberty argument, writing that the decision rested upon “one of the ‘fundamental freedoms’ guaranteed by the due process clauses [sic] of the Fourteenth Amendment.”¹⁷¹ Meanwhile, the first round of commentary in the law reviews endorsed the incorporation argument, contending that Harlan’s opinion had located the freedom of association in the First Amendment. The *Ohio State Law Journal* tied the new freedom of association to the freedom of assembly and suggested that the decision reinforced that “First amendment rights occupy a high position in the hierarchy of constitutional freedoms and may be limited only when the state has a compelling interest.”¹⁷² The *Brooklyn Law Review* concluded that the freedom of association, although not mentioned in the First Amendment, was “included therein.”¹⁷³ And the *George Washington Law Review* suggested that “the new freedom of association is a cognate of . . . first amendment freedoms and enjoys coordinately their preferred status.”¹⁷⁴ The only thing clear from these initial reactions was that nobody

¹⁷⁰“Freedom of Association,” *Washington Post*, July 3, 1958, p. A12 (emphasis added).

¹⁷¹“Freedom to Associate,” *New York Times*, July 2, 1958, p. 28.

¹⁷²Frank M. Hays, “State May Not Compel Association to Disclose Names of Members,” *Ohio State Law Journal* 20 (1959): 123, 124-25, 124 n.8. Cf. *ibid.*, 126 (the Court followed “quite closely its previous holdings in the area of free speech and assembly”).

¹⁷³“Freedom of Association—Right to Privacy,” *Brooklyn Law Review* 25 (1985): 123.

¹⁷⁴Myron Solter, “Freedom of Association—A New and Fundamental Civil Right,” *George Washington Law Review* 27 (1959): 653, 672. The *Harvard Law Review*’s summary of *Alabama* noted that the holding rested on “freedom of association” but did not elaborate on the nature or source of that freedom. “Disclosure of Membership Lists,” *Harvard Law Review* 72 (1958): 193, 194.

was clear about the source or scope of the new right of association. The Court would defer to later cases to resolve those questions.

1. Uphaus and Barenblatt: Ducking the Hard Question

The Court's first opportunities to apply *NAACP v. Alabama* came the following term in *Uphaus v. Wyman*¹⁷⁵ and *Barenblatt v. United States*,¹⁷⁶ two cases involving inquiries into alleged communist affiliations. The new freedom of association could have provided increased protection against the overzealous investigations of the McCarthy era. But while Anthony Lewis had characterized *NAACP v. Alabama* as "an illustration of the [C]ourt's concern for the Constitutional right to express beliefs and ideas, however unpopular, through effective means," when the Court turned from the *NAACP* to the Communist Party, it became clear that not all associations were created equal.¹⁷⁷

Uphaus involved another inquiry by New Hampshire's Attorney General, Louis Wyman, who had been on the losing end of the Court's *Sweezy* decision two years earlier. Without mentioning the freedom of association, Justice Clark suggested that the case turned on "the single question of whether New Hampshire, under the facts here, is precluded from compelling the production of the documents by the Due Process Clause of the Fourteenth Amendment."¹⁷⁸ Clark concluded that the "governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational

¹⁷⁵*Uphaus v. Wyman*, 360 U.S. 72 (1959).

¹⁷⁶*Barenblatt v. United States*, 360 U.S. 109 (1959).

¹⁷⁷Anthony Lewis, "High Court Term a Significant One," *New York Times*, July 6, 1958, p. 29.

¹⁷⁸*Uphaus*, 77.

privacy.”¹⁷⁹ Brennan filed a lengthy dissent premised on “the constitutionally protected rights of speech and assembly.”¹⁸⁰ Because he saw “no valid legislative interest” behind Wyman’s inquiry, Brennan didn’t see the need for any balancing of interests.¹⁸¹ He thought that the “Court’s approach to a very similar problem in *NAACP v. Alabama* should furnish a guide to the proper course of decision here.”¹⁸²

Barenblatt, which unlike *NAACP v. Alabama* and *Uphaus* involved a congressional action, gave the Court its first opportunity to explain how the new right of association applied to the federal government. There were two possibilities. If association were a First Amendment right, then it would apply directly to actions of Congress.¹⁸³ If, on the other hand, association were rooted in liberty, it presumably would apply to the federal government through the Due Process Clause of the Fifth Amendment.¹⁸⁴ Harlan’s opinion for the Court unambiguously accepted the former view:

¹⁷⁹*Ibid.*, 81.

¹⁸⁰*Ibid.*, 82 (Brennan, J. dissenting). Brennan’s dissent conflated speech, expression, assembly, association, and privacy, referring at times to the “rights of association and expression,” *Ibid.*, 106, and “the interest in privacy as it relates to freedom of speech and assembly.” *Ibid.*, 107-08. But he made his most frequent appeals to the constitutional rights of “speech and assembly.” *Ibid.*, 82, 83, 97, 105, 106, 107-08. Black, Douglas, and Warren joined Brennan’s dissent.

¹⁸¹*Ibid.* Brennan wrote: “The Court describes the inquiry we must make in this matter as a balancing of interests. I think I have indicated that there has been no valid legislative interest of the State actually defined and shown in the investigation as it operated, so that there is really nothing against which the appellant’s rights of association and expression can be balanced.” *Ibid.*, 106.

¹⁸²*Ibid.*, 103.

¹⁸³See *U.S. Constitution*, Amendment I (“Congress shall make no law . . .”).

¹⁸⁴The right of association couldn’t be applied to the federal government through the Due Process Clause of the Fourteenth Amendment because that provision applied only to “States.” The Fifth Amendment applies to the federal government and forbids the

“[t]he precise constitutional issue confronting us is whether the Subcommittee’s inquiry into [Barenblatt’s] past or present membership in the Communist Party transgressed the provisions of the First Amendment.”¹⁸⁵

Barenblatt presented facts similar to those in *Watkins*, one of the Court’s 1957 Red Monday decisions. The HUAC had summoned Barenblatt, who had taught psychology at Vassar, to ask him questions about an alleged affiliation with the Communist Party while he had been a graduate student at the University of Michigan.¹⁸⁶ Like *Watkins*, Barenblatt had refused on First Amendment grounds to answer questions. In the earlier case, Chief Justice Warren had skirted the First Amendment challenge and instead concluded in general due process terms that *Watkins* could not reasonably have been expected to know which questions from the HUAC were pertinent to its legitimate inquiry (Frankfurter later referred to Warren’s efforts as that “god-awful *Watkins* opinion”).¹⁸⁷ Harlan, writing for the Court in *Barenblatt*, distinguished *Watkins* on the basis that the HUAC questions to Barenblatt were pertinent to the inquiry.¹⁸⁸

deprivation of “liberty . . . without due process of law.” See *U.S. Constitution*, Amendment V.

¹⁸⁵*Barenblatt*, 126. See also *Ibid.* (“Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships.”). Harlan’s conclusion that the right of association limiting the federal government was found in the First Amendment is not inconsistent with his view that the right of association limiting state action was in the Fourteenth Amendment. That was, in essence, how he viewed rights specifically enumerated in the First Amendment.

¹⁸⁶*Barenblatt*, 113-114.

¹⁸⁷Yarbrough, *John Marshall Harlan*, 201 (quoting Frankfurter).

¹⁸⁸*Barenblatt*, 125.

Like Clark in *Uphaus*, Harlan largely eschewed the right of association and instead used a “balancing of interests” analysis. Frankfurter had been pushing for this approach for some time, first in his *Dennis* concurrence and more recently in his *Sweezy* concurrence. When Harlan circulated a draft of his *Barenblatt* opinion, Frankfurter responded with the suggestion that Harlan include “a few pungent paragraphs putting the case in its setting.”¹⁸⁹ This should happen “[b]efore the reader gets involved in the details of balancing.”¹⁹⁰ Harlan’s revised opinion incorporated Frankfurter’s suggestions and emphasized “the close nexus between the Communist Party and violent overthrow of government.”¹⁹¹

As Lucas Powe notes, Harlan never explained how the government’s “right of self preservation” related to “asking a former psychology instructor at Vassar about meetings when he was a graduate student.”¹⁹² Moreover, Harlan failed to articulate a single interest of *Barenblatt*’s against which the government’s interests could be balanced, noting only that “the record is barren of other factors which, in themselves, might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state.”¹⁹³ Black’s dissent quipped that Harlan had rewritten the First Amendment to read that “Congress shall pass no law abridging the freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the

¹⁸⁹Yarbrough, *John Marshall Harlan*, 202 (quoting Felix Frankfurter to John M. Harlan, June 3, 1959).

¹⁹⁰*Ibid.*

¹⁹¹*Barenblatt*, 120.

¹⁹²Powe, *The Warren Court and American Politics*, 144.

¹⁹³*Barenblatt*, 134.

joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.”¹⁹⁴ In a particularly poignant passage, Black wrote:

The fact is that, once we allow any group which has some political aims or ideas to be driven from the ballot and from the battle for men’s minds because some of its members are bad and some of its tenets are illegal, no group is safe. . . . History should teach us [that] in times of high emotional excitement, minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs, and attempts will always be made to drive them out. It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time.¹⁹⁵

Neither Clark in *Uphaus* nor Harlan in *Barenblatt* included any discussion about the constitutional right of association. Harlan referred only once to “rights of association assured by the Due Process Clause of the Fourteenth Amendment.”¹⁹⁶ Clark mentioned “associational privacy” made applicable through “the Due Process Clause of the Fourteenth Amendment.”¹⁹⁷ But both decisions avoided a direct application of the new right. That would come not in a communist case but in one with facts remarkably similar to those in *NAACP v. Alabama*.

¹⁹⁴Ibid., 143 (Black, J., dissenting). Douglas and Warren joined the dissent. Brennan dissented separately.

¹⁹⁵Ibid., 150-51. Black rested his dissent on the First Amendment rights of speech and association.

¹⁹⁶*Barenblatt*, 127.

¹⁹⁷*Uphaus*, 78, 77.

2. *Applying the Right of Association*

In *Bates v. City of Little Rock*, the Court reviewed the convictions of two records custodians who had refused to produce local NAACP membership lists as required by ordinances in two Arkansas cities.¹⁹⁸ Like the disclosure order that had led to the Alabama litigation, the Arkansas ordinances were designed to cripple the NAACP.¹⁹⁹ Relying on the freedom of association, Justice Stewart's majority opinion cited *De Jonge* and *NAACP v. Alabama* to link association with assembly:

Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty (citing the First Amendment). And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.²⁰⁰

As with Harlan's wording in *NAACP v. Alabama*, Stewart's language could be read to support either the incorporation argument or the liberty argument. To confuse matters further, Black and Douglas asserted the assembly argument in a joint concurrence:

We concur in the judgment and substantially with the opinion because we think the facts show that the ordinances as here applied violate freedom of speech and assembly guaranteed by the First Amendment which this Court has many times held was made applicable to the States by the Fourteenth Amendment. . . . One of those rights, *freedom of assembly*, includes of

¹⁹⁸*Bates v. Little Rock*, 361 U.S. 516 (1960).

¹⁹⁹See Joseph B. Robison, "Protection of Associations From Compulsory Disclosure of Membership," *Columbia Law Review* 58 (1958): 614. Similar statutory efforts unfolded in Virginia, Texas, and Tennessee. *Ibid.*, 616. Louisiana attacked the NAACP through an existing state law that had originally been drafted against the Ku Klux Klan. *Ibid.*, 617.

²⁰⁰361 U.S. at 522-23.

course freedom of association; and it is entitled to no less protection than any other First Amendment right.²⁰¹

Ten months after *Bates*, Stewart again wrote for the majority in *Shelton v. Tucker*.²⁰² The case involved a challenge to an Arkansas statute requiring every teacher at a state-supported school or college to file an annual affidavit disclosing all organizations to which he or she had belonged or regularly contributed in the previous five years. Although the affidavit requirement wasn't overtly aimed at the NAACP, the Arkansas statute clearly targeted the organization.²⁰³ In *Bates*, Stewart had cited *De Jonge* in linking association to assembly. In *Shelton*, he again cited *De Jonge* but now omitted any reference to assembly, referring instead to a "right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society."²⁰⁴ Unlike the unanimous decisions in *NAACP v. Alabama* and *Bates*, the Court split 5-4 in *Shelton*, with Frankfurter and Harlan joined by Clark and Whittaker in dissent. Harlan's dissent asserted that "[t]he rights of free speech and association embodied in the 'liberty' assured against state action by the Fourteenth

²⁰¹Ibid., 527-28 (Black and Douglas, JJ., concurring) (emphasis added). A note in the *Virginia Law Review* published after *Bates* suggested that "the concept of 'freedom of association' illustrates the development of a judicial technique" for dealing with the particular kind of situation at issue in *NAACP v. Alabama* and *Bates* rather than "an enunciation of an independent constitutional right." Peter R. Fisher, "Freedom of Association: Constitutional Right or Judicial Technique?", *Virginia Law Review*, 46 (1960): 730.

²⁰²*Shelton v. Tucker*, 364 U.S. 479 (1960).

²⁰³B.T. Shelton had refused to file the affidavit due to his membership in the NAACP. Ibid., 483. He had originally challenged both the affidavit requirement and a separate Arkansas statute making it unlawful for any member of the NAACP to be employed by the State of Arkansas. Ibid., 484 n.2.

²⁰⁴Ibid., 486.

Amendment are not absolute,” reiterating both his liberty argument and his endorsement of a kind of balancing.²⁰⁵

In 1961, a year after *Shelton*, Douglas wrote the majority opinion in *Louisiana v. NAACP*.²⁰⁶ The case had arisen in 1956, after Louisiana sought to enjoin the NAACP from doing business in the state. The State asserted that the NAACP had violated two state statutes, the first of which prohibited associations from doing business with out-of-state communist or subversive organizations, and the second of which required “benevolent” associations to disclose the names and addresses of all officers and members regulating associations.²⁰⁷ The Court struck down both statutes. Douglas dispensed of the first provision on vagueness grounds without referring to the right of association. Turning to the second provision, Douglas wrote that “freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment.”²⁰⁸ He interpreted *Shelton* to have emphasized that “any regulation must be highly selective in order to survive challenge under the First Amendment”²⁰⁹ and peppered his opinion with other references to the First Amendment. The four justices who had dissented in *Shelton* concurred in the judgment but not in Douglas’s opinion.²¹⁰

²⁰⁵*Ibid.*, 496 (Harlan, J., dissenting) (citations omitted).

²⁰⁶*Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961).

²⁰⁷*Ibid.*, 294.

²⁰⁸*Ibid.*, 296.

²⁰⁹*Ibid.*

²¹⁰*Ibid.*, 297.

3. *Red Cases and Black Cases*

The first four cases in which a majority of the Court had explicitly relied on the constitutional right of association (*NAACP v. Alabama*, *Bates*, *Shelton*, and *Louisiana v. NAACP*) had all invalidated regulations aimed at the NAACP. On a practical level, these decisions were critical to the Civil Rights movement. As Samuel Walker has argued, “[t]he NAACP could not have survived in the South, and the civil rights movement would have been set back for years, without the new freedom of association protections.”²¹¹ But if the enforcement of a right of association for members of the NAACP sustained that organization’s existence, the failure to enforce that same right on behalf of members of the CPUSA almost certainly contributed to its demise.

A majority of the Court had already shown a reluctance to apply or even acknowledge a right of association for communists in *Uphaus* and *Barenblatt*. This trend intensified in 1961. In *Communist Party v. Subversive Activities Control Board (SACB)*, the Court reviewed the Subversive Activities Control Act, which imposed registration and disclosure requirements on “subversive” organizations.²¹² Harry Kalven has suggested that *SACB* “should have been the architectonic case for freedom of

²¹¹Walker, *In Defense of American Liberties*, 241. Membership in the NAACP in the South had fallen from 128,000 in 1955 to 80,000 in 1957, and almost 250 branches had closed. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 383. In Louisiana, membership plummeted from 13,000 to 1,700 and in South Carolina it fell from 8,200 to 2,000. *Ibid.* The litigation that led to *NAACP v. Alabama* effectively shut down the NAACP in that state from the time of the 1956 injunction until the case was finally resolved in 1964 (following additional litigation after the Supreme Court’s decision). *Ibid.*

²¹²*Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961) (“SACB”).

association” because the statute at issue “aimed at sanctioning association and thus openly posed the issue that had been disguised as a speech problem in *Dennis*.”²¹³ Instead, the Court upheld the entire Act in the same 5-4 split as *Uphaus* and *Barenblatt*. Frankfurter wrote the lengthy majority opinion, distinguishing the case from *NAACP v. Alabama*, *Bates*, and *Shelton* based on “the magnitude of the public interests which the registration and disclosure provisions are designed to protect” and “the pertinence which registration and disclosure bear to the protection of those interests.”²¹⁴ Although the justices disagreed on the outcome, they all agreed that the right of association applied to the federal government through the First Amendment.²¹⁵

²¹³Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (New York: Harper and Row, 1988) at 264. Kalven contends that the 212 pages of opinions by the justices and the belief that the case involved legislation limited in scope to the Communist Party has led it to be “treated as outside the mainstream of First Amendment precedent.” *Ibid.* He argues that despite its verbosity, *SACB* “is quite possibly the precedent which carries the greatest threat to political freedoms in the future” and deserves a “central place” in First Amendment case law. *Ibid.*

²¹⁴*SACB*, 93.

²¹⁵Frankfurter titled a section of his opinion “The Freedoms of Expression and Association Protected by the First Amendment.” *Ibid.*, 88. He asserted that “the power of Congress to regulate Communist organizations [subject to foreign control] is extensive,” but that power was “limited by the First Amendment.” *Ibid.*, 95, 96. Frankfurter concluded that the Act’s registration provisions were “not repugnant to the First Amendment,” and that certain accounting provisions did not violate “First Amendment rights.” *Ibid.*, 103. Douglas’s dissent noted that “[f]reedom of association is included in the bundle of First Amendment rights,” *Ibid.*, 171 (Douglas, J., dissenting) (citing *NAACP v. Alabama*, 460). Brennan’s partial dissent referred to “the rights of freedom of advocacy and association guaranteed by the First Amendment.” *Ibid.*, 191 (Brennan, J., dissenting in part). Warren joined Brennan’s partial dissent. Black’s dissent never explicitly referenced a “First Amendment right of association,” but his opinion made clear that he accepted the First Amendment argument. See, e.g., *ibid.*, 148 (Black, J., dissenting) (“The freedom to advocate ideas about public matters through associations of the nature of political parties and societies was contemplated and protected by the First Amendment.”). Although *SACB* suggested that all nine justices accepted that the right of association applied against the federal government came from the First Amendment, the source of the right of association constraining state action remained unclear.

On the same day that it decided *SACB*, the Court issued its 5-4 decision in *Scales v. United States*.²¹⁶ Harlan wrote the opinion upholding a conviction under the Smith Act's membership clause, which he construed as requiring proof of "active" rather than merely "passive" membership in the Communist Party.²¹⁷ Harlan insisted that a conviction under the act required the government to establish more than mere membership, but "active and purposive membership, purposive that is as to the organization's criminal ends."²¹⁸

All nine justices had backed the right of association for the NAACP in *NAACP v. Alabama, Bates, and Louisiana*. Stewart's vote had ensured a similar outcome in *Shelton*. But in *Uphaus, Barenblatt, SACB* and *Scales*, Stewart joined Frankfurter, Harlan, Whittaker, and Clark to deny these same associational protections to the CPUSA. In the words of ACLU legal director Mel Wulf, there were "red cases and black cases."²¹⁹ Kalven phrased it more bluntly: "[t]he Communists cannot win, the NAACP cannot lose."²²⁰

²¹⁶*Scales v. United States*, 367 U.S. 203 (1961). The Court also issued its opinion in *Noto v. United States*, 367 U.S. 290 (1961), which unanimously reversed a conviction under the Smith Act's membership clause. But *Noto* relied exclusively on a sufficiency of the evidence analysis. *Ibid.*, 291 ("The only one of petitioner's points we need consider is his attack on the sufficiency of the evidence, since his statutory and constitutional challenges to the conviction are disposed of by our opinion in *Scales*, and consideration of his other contentions is rendered unnecessary by the view we take of his evidentiary challenge.").

²¹⁷*Ibid.*

²¹⁸*Ibid.*

²¹⁹Walker, *In Defense of American Liberties*, 240.

²²⁰Kalven, *A Worthy Tradition*, 259. Cf. Walker, *In Defense of America Liberties*, 240 (referring to "a double standard for political groups").

There was certainly a kind of double standard at work, but it wasn't as stark as Wulf and Kalven suggested. Harlan's judicial restraint and deference to government officials on national security matters made him less than eager to join the Warren Court's curtailment of government inquiries in the name of civil liberties.²²¹ *NAACP v. Alabama* had been an easy case for him because he believed that the State hadn't shown *any* legitimate interest in the NAACP's membership list. *Bates* differed from *NAACP v. Alabama* and required a balancing of interests. Although the decision ended up unanimous, Harlan had originally drafted a dissent.²²² According to Brennan's conference notes, Harlan believed that while "[t]here can be little doubt that much of the association information called for by the statute will be of little or no use whatever to the school authorities," he could "not understand how those authorities can be expected to fix in advance the terms of their inquiry so that it will yield only relevant information."²²³ *Shelton* had been even closer than *Bates* and hinged on Stewart's vote. The four dissenters (Frankfurter, Harlan, Whittaker, and Clark) believed that the government had shown a rational relationship between its articulated interest and the nature of the regulation. And while Stewart disagreed in *Shelton*, his position in the communist cases left open the possibility that a better articulated government interest would prevail over an NAACP claim to the right of association.

²²¹See Yarbrough, *John Marshall Harlan*, 339 (noting Harlan's "reluctance as a Justice to second-guess the judgments of government officials regarding national security matters").

²²²*Ibid.*, 212.

²²³*Ibid.* (quoting Brennan Papers, Box 407).

4. Gibson v. Florida Legislative Investigation Committee

A Supreme Court case connecting communism and the NAACP “was every segregationist’s dream” and offered “the South the chance to take out the NAACP by painting the organization red.”²²⁴ That case began in 1956, when the Florida legislature started to investigate an alleged communist influence on the NAACP. As part of its inquiry, the legislative investigation committee subpoenaed the membership list of the organization’s Miami branch. Theodore Gibson, the custodian of the list, refused to produce it, asserting that doing so would violate the associational rights of members of the NAACP. He did, however, volunteer to answer questions based on his personal knowledge, and when the committee provided him with the names and pictures of fourteen individuals, he testified that to his knowledge they were not members of the NAACP. The committee nonetheless cited Gibson for contempt for his failure to produce the records, and he was fined \$1,200 and sentenced to six months’ imprisonment. The Florida Supreme Court upheld his conviction and Gibson appealed to the United States Supreme Court.

At the conference following oral argument, Warren protested that affirming *Gibson* would mean overruling *NAACP v. Alabama* because even under a balancing theory the state had shown “no adequate interest.”²²⁵ But Harlan viewed the investigation as “a bona fide inquiry into Communism” rather than “a plot to destroy [the] NAACP.”²²⁶ The justices voted to uphold the conviction, and it appeared that the government’s

²²⁴Powe, *The Warren Court and American Politics*, 155.

²²⁵Yarbrough, *John Marshall Harlan*, 210.

²²⁶*Ibid.*

national security interests would prevail over the NAACP's right of association.²²⁷

Frankfurter, the senior justice in the majority, assigned the opinion to Harlan.²²⁸

Five months later, before Harlan had circulated a draft of his opinion, Whittaker retired from the Court and the case (now deadlocked at 4-4) was held over for reargument.²²⁹ Then Frankfurter suffered a stroke and left the Court. When *Gibson* was reargued the following term, Byron White had replaced Whittaker and Arthur Goldberg had succeeded Frankfurter. Goldberg provided the fifth vote for the NAACP. He authored the majority opinion, distinguishing the case from earlier legislative investigation cases because Gibson had not been asked about his own associations with the Communist Party.²³⁰ Samuel Walker suggests that "*Gibson* was the clearest indication of the extent to which the Court granted to the NAACP the protections it had refused to extend to the Communists."²³¹

²²⁷Powe, *The Warren Court and American Politics*, 155.

²²⁸Yarbrough, *John Marshall Harlan*, 210.

²²⁹Powe, *The Warren Court and American Politics*, 156.

²³⁰*Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). Powe writes that Goldberg was "looking for a way to protect the NAACP without having to overrule all the legislative-investigation cases" Powe, *The Warren Court and American Politics*, 221. Goldberg's opinion referred to "[t]he First and Fourteenth Amendment rights of free speech and free association" and "First and Fourteenth Amendment associational rights of individuals." *Gibson*, 544, 546. Harlan's dissent argued that the Court's decision forced the legislative committee "to prove in advance the very things it is trying to find out." *Gibson*, 576 (Harlan, J. dissenting).

²³¹Walker, *In Defense of American Liberties*, 241. Cf. Milton R. Konvitz, *Expanding Liberties: The Emergence of New Civil Liberties and Civil Rights in Postwar America* (New York: Viking Press, 1967), 109 ("if Alabama or Arkansas or Florida or Louisiana had won in the Court, a way would have opened for the South to paralyze the N.A.A.C.P. and any other civil rights or civil liberties organization; and since the Bill of Rights is not self-executing, but is dependent upon vindication through litigation, the struggle for freedom and equality would have been effectively arrested)."

Black and Douglas wrote separate concurrences. In Black's view that "the constitutional right of association includes the privilege of any person to associate with Communists or anti-Communists, Socialists or anti-Socialists, or, for that matter, with people of all kinds of beliefs, popular or unpopular."²³² Douglas's concurrence, which may have been drafted as a dissent before the case was held over for reargument, read more like a college essay than a legal opinion.²³³ He quoted or cited eight law review articles (including one written by Brennan), Yale President A. Whitney Griswold's 1958 baccalaureate address, Edwin Corwin's *The Constitution and What it Means Today*, Hannah Arendt's *On Revolution*, Thomas Jefferson's "Bill for Establishing Religious Freedom," Arthur Schlesinger's *The Rise of the City*, James Madison's *Federalist* No. 51, Robert Bolt's play *A Man for All Seasons*, and George Orwell's *Nineteen Eighty-Four*.²³⁴ Douglas also registered his adherence to the incorporation argument for association. He framed the constitutional issue as "the authority of a State to investigate people, their ideas, their activities" and asserted that "[b]y virtue of the Fourteenth Amendment the State is now subject to the same restrictions in making the investigation as the First Amendment places on the Federal Government."²³⁵ Douglas took direct aim at Harlan in a footnote:

²³²*Gibson*, 559 (Black, J., concurring).

²³³One suspects that Douglas, who had a propensity for writing his opinions quickly, may have drafted his concurrence as a dissent before the case was held over and Goldberg's replacement of Frankfurter reversed the outcome. Cf. Lucas A. Powe, Jr. "Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights," *Constitutional Commentary* 6 (1989): 271 (Douglas "wrote his dissents before the author of the majority had put pen to paper").

²³⁴*Gibson*, 560 (Douglas, J., concurring).

²³⁵*Ibid.*

Some have believed that these restraints as applied to the States through the Due Process Clause of the Fourteenth Amendment are less restrictive on them than they are on the Federal Government. That is the view of my Brother Harlan. . . . But that view has not prevailed. The Court has indeed applied the same First Amendment requirements to the States as to the Federal Government.²³⁶

Douglas thus made clear his belief that the right association originated in the First Amendment and not the Fourteenth. He was far less lucid in attempting to distinguish between association and assembly. He began with a paean to the right of assembly:

Joining a lawful organization, like attending a church, is an associational activity that comes within the purview of the First Amendment, which provides in relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people, peaceably to assemble, and to petition the government for a redress of grievances.” “Peaceably to assemble” as used in the First Amendment necessarily involves a coming together, whether regularly or spasmodically. Historically the right to assemble was secondary to the right to petition, the latter being the primary right. But today, as the Court stated in *De Jonge v. Oregon*, “The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.” Assembly, like speech, is indeed essential in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. The holding of meetings for peaceable political action cannot be proscribed. A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.²³⁷

It appeared, then, that Douglas was gesturing at the assembly argument. But a few pages later, he revisited the “bundle of rights” language that had appeared in his *Louisiana v. NAACP* opinion and his *SACB* dissent. He connected this bundle to a “right of privacy”:

The right of association has become a part of the bundle of rights protected by the First Amendment, and the need for a pervasive right of privacy against government intrusion has been recognized, though not

²³⁶*Ibid.*, 560 n.2 (citations omitted).

²³⁷*Ibid.*, 562-63 (internal citations and quotations omitted).

always given the recognition it deserves. Unpopular groups like popular ones are protected. Unpopular groups if forced to disclose their membership lists may suffer reprisals or other forms of public hostility. But whether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter.²³⁸

According to Douglas, not only was the right of association somehow derivative of the First Amendment right of assembly, it was also “part of the bundle of rights protected by the First Amendment” and related to “the right of privacy implicit in the First Amendment.”²³⁹

5. *Confusion in the Academy*

The new right of association produced a stream of historical and doctrinal analyses. Book length treatments included Glenn Abernathy’s *The Right of Assembly and Association*,²⁴⁰ Charles Rice’s *Freedom of Association*,²⁴¹ and David Fellman’s *The Constitutional Right of Association*.²⁴² These works sought to narrate a history of association that had been absent from nearly two centuries of American constitutional

²³⁸Ibid., 569-570 (citations omitted).

²³⁹Douglas reiterated his arguments for association (some of which were taken verbatim from his *Gibson* concurrence) in a lecture that he delivered at Brown University and subsequently published in the *Columbia Law Review*. See William O. Douglas, “The Right of Association,” *Columbia Law Review* 63 (1963). Harlan’s dissent in *Gibson* (joined by Clark, Stewart, and White) ignored Douglas’s attacks on the liberty argument for association.

²⁴⁰Glenn Abernathy, *The Right of Assembly and Association*, (Columbia : University of South Carolina Press, 1961).

²⁴¹Charles E. Rice, *Freedom of Association* (New York: New York University Press, 1962).

²⁴²David Fellman, *The Constitutional Right of Association* (Chicago : University of Chicago Press, 1963).

law. Fellman, for example, suggested that “however ill-defined they may be, the rights of association have a definite place in American constitutional law.”²⁴³ Rice argued that “[t]he right to associate for the advancement of ideas ha[d] been recognized implicitly in the past, and it ha[d] underlain important decisions which have been formally ascribed to the application of other freedoms.”²⁴⁴ Carl Beck’s *Contempt of Congress* took the most creative route, referring to a nonexistent “freedom of political affiliation clause[] of the First Amendment.”²⁴⁵

Abernathy provided the most comprehensive account of association. He had first speculated about a right of association in a 1953 article published in the *South Carolina Law Quarterly*.²⁴⁶ Quoting extensively from Tocqueville and Arthur Schlesinger, Abernathy had suggested that the importance of freedom of association in a democratic

²⁴³Ibid.

²⁴⁴Rice, *Freedom of Association*, xvii-xviii.

²⁴⁵Beck, *Contempt of Congress*, viii. Beck is not alone in making such a claim: at least twenty-five federal district and appellate court opinions refer to a “freedom of association clause.” See, e.g., *Swanson v. City of Bruce*, 105 Fed. Appx. 540, 542 (5th Cir. 2004) (unpublished opinion) (referring to “the freedom of association clause”); *Boyle v. County of Allegheny*, 139 F.3d 386, 394 (3d Cir. 1998) (asserting that the plurality opinion in *Elrod v. Burns*, 427 U.S. 247 (1976) “held that the discharge of a government employee because of his political affiliation violates the freedom of association clause of the First Amendment”); *Darnell v. Campbell County Fiscal Court*, 924 F.2d 1057 (6th Cir. 1991) (unpublished opinion) (discussing the requirements for a prima facie case under “the freedom of association clause of the first amendment”); *Grace United Methodist Church v. City of Cheyenne*, 427 F.Supp. 2d 1186, 1203 (2006) (“The First Amendment’s Free Speech Clause and Freedom of Association Clauses apply to the states through the Fourteenth Amendment.”); *Hyman v. City of Louisville*, 132 F.Supp. 2d 528, 543 (2001) (“The Supreme Court has interpreted the First Amendment to provide little protection under the Freedom of Association Clause to commercial enterprises.”).

²⁴⁶Glenn Abernathy, “The Right of Association,” *South Carolina Law Quarterly* 6 (1953): 32-77.

society “cannot be overestimated.”²⁴⁷ Noting that the Supreme Court had at that time yet to recognize a right of association, he argued that it was nonetheless “a right cognate to those of free speech and free assembly.”²⁴⁸ Reviewing Congress’s anti-communist legislation and the Court’s *Adler* decision, Abernathy expressed concern that these developments hindered Americans from joining all but the most “ultra-acceptable” associations.²⁴⁹ He decried “shotgun legislation which endangers the whole institution of voluntary association” and argued for a “broad freedom to associate.”²⁵⁰ But Abernathy’s principal concern for free association had little to do with protecting unpopular or dissenting groups like the Communist Party. Rather, his instrumental view of association contended that:

[Associations] serve as a training ground for group participation, organization and management of people and programs, and for democratic acceptance of the majority will. They can also serve as a potential influence for improvement of communication between the individual and the government. Concerted demands for action by associations of people have a better chance for accomplishing the desired governmental action than do scattered individual requests. And the information furnished to administrators and legislators by private associations of various kinds is in many instances vital to the intelligent treatment of particular problems.²⁵¹

From this perspective, Abernathy concluded that “political parties are our most important associations.”²⁵²

²⁴⁷Ibid., 33.

²⁴⁸Ibid., 75, 34, 33.

²⁴⁹Ibid., 72.

²⁵⁰Ibid., 77.

²⁵¹Ibid., 75-76.

²⁵²Abernathy, “The Right of Association,” 76.

Abernathy's book-length treatment eight years later underscored the themes of his article:

[E]xperience in various associations is virtually a guarantee of respect for the majority view. It does not necessarily lead to complete acceptance of the majority will, but it does lead usually to a sufficient respect for that will to enable the group to act in concert once a decision has been made. This acquiescence in the decisions of the majority, based in large part on experience in associations of various types, is an important explanation of the fact that Americans can close ranks and function as a strongly united nation after an election which is preceded by almost violent contests between the two major political parties.²⁵³

Abernathy's characterization contained two implicit assumptions. The first was that a kind of bounded consensus across groups ensured stability in the midst of disagreement. The second was that the internal practices of associations mirrored democratic practices in which majority will prevailed. Neither of these assumptions is inherent in the nature of groups.

Abernathy intimated that *NAACP v. Alabama* had relied on the assembly argument. He argued that the decision had placed the right of association within an "expanded meaning" of the right of assembly,²⁵⁴ and that association was "clearly a right cognate to the right of assembly."²⁵⁵ The right of assembly "need not be artificially narrowed to encompass only the physical assemblage in a park or meeting hall. It can

²⁵³Abernathy, *The Right of Assembly and Association*, 240.

²⁵⁴*Ibid.*, 4.

²⁵⁵*Ibid.*, 173. Cf. *ibid.*, 252 ("With the increasing emphasis on the right of association as a cognate to the right of assembly, it appears that this least-discussed of the First Amendment rights is at last acquiring an independent status.").

justifiably be extended to include as well those persons who are joined together through organizational affiliation.”²⁵⁶

Abernathy also noted a constraint of the right of association announced in *NAACP v. Alabama*:

It must be noted that [*NAACP v. Alabama*] does not clearly extend the First Amendment protection to *all* lawful affiliations or organizations. What Justice Harlan discusses is the association “for the advancement of beliefs and ideas.” Clearly a vast number of existing associations would fall within this description, but it is questionable whether the characterization would fit the purely social club, the garden club, or perhaps even some kinds of trade or professional unions. No such distinction has been drawn in the cases squarely involving freedom of assembly questions. The latter cases emphasize that the right extends to any lawful assembly, without a specific requirement that there be an intention to advance beliefs and ideas.²⁵⁷

In observing the limitation in scope, Abernathy had detected an important distinction between assembly and association. He quickly brushed it aside: “The practical effect, of course, may be unimportant, since fairly obviously the Court would be inclined to scrutinize restrictions on social clubs less closely than those on organizations identifying themselves more intimately with the political process.”²⁵⁸ But the real danger was greater than Abernathy surmised; it becomes apparent when we consider who gets to decide whether an organization exists “for the advancement of beliefs or ideas” or is involved “intimately with the political process.” As a practical matter, these kind of legal distinctions are always made by some representative of government, which means that

²⁵⁶Ibid.

²⁵⁷Ibid., 236-37. Abernathy’s observations foreshadow the kinds of arguments that unfolded around the concept of “expressive association” that the Court invented two decades later in *Roberts v. United States Jaycees*. See Chapter 3.

²⁵⁸Ibid., 237.

the boundaries of the right of association are defined by the subjective political judgment of those who exercise coercive power. And, as Abernathy noted, this limitation is one that is absent in the right of assembly.²⁵⁹

It is not entirely surprising that scholarly treatment of the right of association reflected the Court's own lack of clarity. Writing in 1964, Thomas Emerson observed that "the constitutional source of 'the right of association,' the principles which underlie it, the extent of its reach, and the standards by which it is to be applied have never been clearly set forth" and "the various justices have differed among themselves on all these matters."²⁶⁰ Emerson warned that "a general 'right of association' does not carry us very far in the solution of concrete issues" and "current problems involving associational rights must be framed and answered in terms of more traditional constitutional doctrines."²⁶¹ But the right of association was in large part a right without a history, or at least a constitutional history. Its contours were more likely to be shaped not by traditional doctrine but by the intellectual context in which it emerged. That context was pluralism.

²⁵⁹The right of assembly, of course, requires discriminatory judgment by limiting its protections to groups that don't pose a threat of imminent harm to the state. That judgment is a subjective political one made by the state. But the right of association also includes this political judgment *and* other subjective assessments like the one that Abernathy identified.

²⁶⁰Emerson, "Freedom of Association and Freedom of Expression," 2.

²⁶¹*Ibid.*, 3.

D. PLURALIST POLITICAL THEORY

I have addressed above two contextual factors that contributed to the constitutional framework for the right of association: (1) a political factor (the conflation of anti-communist sentiment and the rise of the civil rights movement); and (2) a jurisprudential factor (the infighting on the Court over the proper way to ground the right of association and the relationship between association and assembly). I turn now to a theoretical factor: the pluralist political theory of the mid-twentieth century. I argue that pluralist assumptions exacerbated the political and jurisprudential factors affecting the right of association and that the postwar pluralism popularized by David Truman and Robert Dahl helped the right of association gain traction in legal and political discourse.

The pluralist tradition that began in the early twentieth century changed the way in which American political thought conceived of the relationship between groups and the state. Against earlier claims that the state captured the totality of politics and political life, pluralism asserted that politics existed in the groups that comprised society. But pluralism replaced the narrative of state theory with its own insistent claim that politics relocated among groups achieved a harmonious *balance* within a broad *consensus* supporting American democracy. The assumption of balance sprang from the pluralist need to attribute the relative stability empirically observable in democratic society to something other than centralized state power. The assumption of consensus perpetuated an exaggerated claim of homogeneity in American history and culture that downplayed fundamental differences between groups. These two assumptions were present in early pluralists like Arthur Bentley and Harold Laski, and they became even more pronounced in postwar pluralists like Truman and Dahl.

Truman and Dahl invoked two familiar authorities to support their pluralist assumptions: Tocqueville's *Democracy in America*²⁶² and Madison's *Federalist* No. 10.²⁶³ But their interpretive efforts misread Madison and decontextualized Tocqueville. With Madison, they converted a negatively construed "faction" into an inherently valuable and implicitly benign "interest." With Tocqueville, they extrapolated a theory derived from the harmony of interests observed in a homogenous segment of the population in preindustrial America to the diversity of interests existing in an increasingly fractured industrialized society. Perhaps most ironically, the pluralist adaptations of Madison and Tocqueville jettisoned both theorists' warnings about the tyranny of the majority. By imposing a balance and consensus that demanded conformity to basic majoritarian conceptions of democracy as a predicate to associational autonomy, hegemonic rule entered through the back door of pluralism and endorsed the very danger against which Madison and Tocqueville had hedged. These pluralist views—and their consequences—set the context for the right of association that emerged in mid-twentieth century America.

1. Power, Balance, and Stability

Early pluralists challenged the modern state's claim to sovereignty, which had gained prominence in German idealism and entered American political thought through

²⁶²Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (New York: D. Appleton, 1899), 203-04.

²⁶³James Madison, "Federalist No. 10," in *The Federalist*, ed. Benjamin F. Wright (New York: Barnes and Noble, 2004).

Francis Lieber.²⁶⁴ While Lieber and others had located the locus of power and politics in the state, pluralism looked instead at the groups that comprised society. The pluralist argument ran contrary not only to German idealism but also to classical liberalism, which in its own way assumed the primacy of the state.²⁶⁵ The critique of state-centered theory meant that the state “began to lose ground as an account of political reality.”²⁶⁶ But pluralists weren’t anarchists, and without Leviathan, they needed something else to account for the relative peace that they observed in American society. They concluded that in the absence of state coercion (the existence of which they downplayed), stability came from a balancing of interests and power among the various groups that comprised the political life of society.

The pluralist view of power and balance began with Arthur Bentley’s *The Process of Government*, which provided one of the earliest systematic attempts to challenge state-centered theory.²⁶⁷ Bentley’s “group basis of politics” focused on interests expressed

²⁶⁴Gunnell, “The Genealogy of American Pluralism,” 254. For a more detailed account of Lieber’s role, see John Gunnell, *Descent of Political Theory* (Chicago : University of Chicago Press, 1993), 24-32. Gunnell writes that Lieber’s *Manual of Political Ethics* sought “to distinguish the state from the family, the church, and other social entities and to establish the primacy of the state.” Ibid., 28. By the 1880s, the theory of the state was “a distinct and influential paradigm” in American political thought. Ibid., 36.

²⁶⁵This is evident in the proto-liberalism of Hobbes’s *Leviathan* but also in Locke’s more familiar liberal thought. Even when Locke discusses a freedom of religious association in his *Letter Concerning Toleration*, he makes clear that when minority practices collide with majority will, the latter prevails. See John Locke, *A Letter Concerning Toleration* (Indianapolis: Hackett, 1983 (1689)), 49 (“No opinions contrary to human Society, or to those moral Rules which are necessary to the preservation of Civil Society, are to be tolerated by the Magistrate.”).

²⁶⁶John Gunnell, “The Genealogy of American Pluralism: From Madison to Behavioralism,” *International Political Science Review* (1996), 256.

²⁶⁷Arthur Bentley, *The Process of Government* (Chicago: University of Chicago Press, 1908).

through group activity.²⁶⁸ He described “the push and resistance between groups” as “pressure” and suggested that “[t]he balance of the group pressures *is* the existing state of society.”²⁶⁹ For Bentley, groups formed the fundamental ontology of politics: “When the groups are adequately stated, everything is stated.”²⁷⁰

Despite its frontal attack on state sovereignty, *The Process of Government* received scant attention in its first printing in 1908. It would, in fact, take a generation before political scientists embraced it for its theory and methodology. But in the intervening years, the monist account of state sovereignty suffered a further setback when German idealism fell out of favor after the First World War.²⁷¹ The alternative theory of politics that emerged in American political thought arrived through the British pluralist Harold Laski.²⁷²

²⁶⁸Bentley, *The Process of Government*, xxxiv.

²⁶⁹Ibid., 258-59 (original emphasis). Bentley doesn’t develop the concept of “balance” to the degree of later pluralists. He describes law as “the pressures being assumed to have worked themselves through to a conclusion or balance” but notes that “the pressures never do as a matter of fact work themselves through to a final balance, and law, stated as a completed balance, is therefore highly abstract.” Ibid., 272.

²⁷⁰Ibid., 208-09.

²⁷¹Gunnell, *The Genealogy of American Pluralism*, 254.

²⁷²Laski drew from other British pluralists including John Figgis, Frederic Maitland, G.D.H. Cole. Herbert H. Deane, *The Political Ideas of Harold J. Laski* (New York: Columbia University Press, 1955), 17, 26-27. Some strands of pluralism also draw from work by the American pragmatists William James and John Dewey. See Avigail I. Eisenberg, *Reconstructing Political Pluralism* (New York: State University of New York Press, 1995), 27-53 (discussing the pluralism of James and Dewey).

Laski and other British pluralists challenged the assumption that the state absorbed all individual loyalties within a community.²⁷³ In Herbert Deane's words, Laski's early political writings were a "constant polemic" against "the conception that the state is to political theory what the Absolute is to metaphysics, that it is mysteriously One above all other human groupings, and that, because of its superior position and higher purpose, it is entitled to the undivided allegiance of each of its citizens."²⁷⁴ Laski asserted that "the state is only one among many forms of human associations" and he advocated a functional decentralization of power in which individuals increasingly turned to private groups to meet their interests and needs.²⁷⁵ He believed the transfer of governmental functions to private entities divided political power.²⁷⁶ During the early 1920s, Laski repeatedly "turned to pluralism as both a 'realistic' account of politics and as the basis of a new democratic theory."²⁷⁷

²⁷³Earl Latham, "The Group Basis of Politics: Notes for a Theory," *American Political Science Review* 46, no. 2 (1952): 379.

²⁷⁴Deane, *The Political Ideas of Harold J. Laski*, 13. A separate prong of Laski's attack against the state challenged legal positivists like Bentham and Austin who maintained that the state was sovereign and that law itself was nothing more than the command of the sovereign. Ibid., 14-15. See also Eisenberg, *Reconstructing Political Pluralism*, 76-77.

²⁷⁵Harold Laski, *Authority in the Modern State* (New Haven: Yale University Press, 1919), 65, 75-81, 384-85. Laski's theory posited "a series of coordinate groups the purpose of which may well be antithetic." Ibid., 84.

²⁷⁶Ibid. See also Deane, *The Political Ideas of Harold J. Laski*, 30-31. Deane writes that Laski's distrust of consolidated political power led him to desire "to see power split up, divided, set against itself, and thrown widespread among men by various devices of decentralization." Ibid., 17. Cf. Grant McConnell, *Private Power and American Democracy* (New York: Knopf, 1966), 119 ("the private association . . . has been linked with the values of decentralization and federalism. It has also been pictured as the source of stability in politics and held up as the medium of the public interest.").

²⁷⁷Gunnell, "The Genealogy of American Pluralism," 257.

Pluralist views gained wider acceptance in the 1930s through “mutually reinforcing empirical studies of group activity and accounts of the new image of democracy which were contrasted with totalitarianism.”²⁷⁸ By the end of the 1930s, “liberalism in political science largely meant pluralism, and pluralism was both a descriptive and a normative thesis.”²⁷⁹ Pendleton Herring’s 1940 book *The Politics of Democracy* claimed that “along with party integration and governmental accountability, political rationality was to be found in the conflict and adjustment between interest groups.”²⁸⁰ This meant that “[d]emocracy was not a matter of theology and creeds, but the practice of tolerance and compromise.”²⁸¹ The pluralist notion of balance extended from political to economic descriptions with John Kenneth Galbraith’s ideas of “countervailing power” and “counterpressures.”²⁸² Meanwhile, lawyer turned sociologist David Riesman argued that power was distributed among “veto groups” that displayed a “necessary mutual tolerance” and “mirror[ed] each other in their style of political action, including their interest in public relations and their emphasis on internal harmony of

²⁷⁸Ibid., 260. Other important works building on Laski’s pluralist concepts included *A History of Political Theories: Recent Times*, ed. Charles Meriam and Henry Elmer Barnes (New York: MacMillan, 1924) and Pendleton Herring, *Group Representation Before Congress* (Baltimore: Johns Hopkins Press, 1929). Laski himself drifted away from pluralism in favor of socialism. Deane writes that by the early 1930s, Laski found “the essence of the state to be its power to enforce its norms upon all who live within its boundaries and its supremacy over all other forms of social grouping.” Deane, *The Political Ideas of Harold J. Laski*, 84.

²⁷⁹Gunnell, *Descent of Political Theory*, 204.

²⁸⁰Gunnell, “The Genealogy of American Pluralism,” 259.

²⁸¹Ibid.

²⁸²John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (Boston: Houghton Mifflin, 1952).

feelings.”²⁸³ Reflecting in 1976, Godfrey Hodgson captured the combination of balance and stability that permeated the pluralist era with his observation that “the businessman and the unskilled laborer, the writer and the housewife, Harvard University and the Strategic Air Command, International Business Machines and the labor movement, all had their parts to play in one harmonious political, intellectual, and economic system.”²⁸⁴

In 1951, David Truman’s *The Governmental Process* described “the vast multiplication of interests and organized groups in recent decades” whose activities “imply controversy and conflict, the essence of politics.”²⁸⁵ Truman asserted that “the behaviors that constitute the process of government cannot be adequately understood apart from the groups.”²⁸⁶ These interests balanced each other: multiple memberships in “potential groups” collectively formed a “balance wheel” in politics.²⁸⁷ Truman argued that “[w]ithout the notion of multiple memberships in potential groups it is literally impossible to account for the existence of a viable polity such as that in the United States or to develop a coherent conception of the political process.”²⁸⁸

²⁸³David Riesman, *The Lonely Crowd: A Study of the Changing American Character* (New Haven: Yale University Press, 1950), 246-51.

²⁸⁴Godfrey Hodgson, *America in Our Time* (Garden City: Doubleday, 1976), 12, quoted in Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (New York: Oxford University Press 2000), 119.

²⁸⁵David Bicknell Truman, *The Governmental Process: Political Interests and Public Opinion* (New York: A. Knopf, 1951), 502.

²⁸⁶*Ibid.*, 502, 503, 506.

²⁸⁷*Ibid.*, 514.

²⁸⁸*Ibid.*

The most important theorist of postwar pluralism was Robert Dahl. Although Dahl drew upon early pluralists like Laski, his outlook was defined by the “behavioral approach” that manifested “a strong sense of dissatisfaction with the achievements of conventional political science, particularly through historical, philosophical, and the descriptive-institutional approaches.”²⁸⁹ With Dahl’s influence, “[t]he mid-1960s marked the apotheosis of pluralism as the substance of the vision of both domestic and comparative politics accepted by behavioralism, and it was embedded in most of the conceptual schemes for political analysis.”²⁹⁰ Over time, Dahl muted some of his more strident assertions, but his initial claims shaped a generation of political science scholarship.²⁹¹

Dahl sought to provide an account of how power was exercised in political decision-making. He started with the premise that the United States was a “polyarchy,” by which he meant a “mixture of elite rule and democracy.”²⁹² Against the “ruling-elite model” advanced by sociologists like C. Wright Mills, Dahl argued that power was

²⁸⁹Gunnell, *Descent of Political Theory*, 221 (quoting Dahl). On Dahl’s indebtedness to Laski, see Eisenberg, *Reconstructing Political Liberalism*, 96; Robert Dahl, *Democracy, Liberty, and Equality* (New York: Oxford University Press, 1986), 281-82 n.11.

²⁹⁰Gunnell, *Descent of Political Theory*, 265.

²⁹¹Richard Merelman suggests that Dahl’s 1956 *A Preface to Democratic Theory* and his 1970 *After the Revolution?* bookend the era of postwar pluralist dominance. Richard Merelman, *Pluralism at Yale: The Culture of Political Science in America* (Madison: University of Wisconsin Press, 2003), 17. Merelman observes that the claims that Dahl considers as “settled” in the former are “up for grabs” in the latter. *Ibid.*, 18.

²⁹²Robert Dahl, *Democracy in the United States: Promise and Performance* (Chicago: Rand McNally, 1972), 35.

diffused among a wide diversity of groups.²⁹³ Democracy was a “government by minorities.”²⁹⁴ Avigail Eisenberg explains the conclusions that flow from this premise:

The direction that public policy follows depends on the nature of the coalition of minorities that dominates the policy-making scene at any given instant. The groups’ reliance on each other creates an informal system of checks and balances in which no group is able to dominate the others. There is no chance for a minority to dominate a coalition because other minorities within the coalition will defect. Similarly, majorities are unable to pose a threat, since they are comprised of small groups, any of which may defect from the coalition if the policy direction changes.²⁹⁵

Paradoxically, then, the lack of widespread agreement produced a stability that prevented discord. For Dahl, the American political system was “a relatively efficient system for reinforcing agreement, encouraging moderation, and maintaining social peace.”²⁹⁶

Dahl’s most explicit endorsement of pluralism is found in his 1967 text, *Pluralist Democracy in the United States*.²⁹⁷ He wrote that “multiple centers of power, none of

²⁹³C. Wright Mills, *The Power Elite* (Oxford: Oxford University Press, 1956).

²⁹⁴Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), 133.

²⁹⁵Eisenberg, *Reconstructing Political Pluralism*, 141.

²⁹⁶Dahl, *A Preface to Democratic Theory*, 151. Eisenberg suggests that stability became the motivation behind Dahl’s research program: “Pluralist politics did not interest Dahl because it provided the highest ideals of democracy. Rather, pluralism was prized because it stabilizes what might otherwise be an unstable and conflict-ridden environment.” Eisenberg, *Reconstructing Political Pluralism*, 158.

²⁹⁷Robert Dahl, *Pluralist Democracy in the United States: Conflict and Dissent* (Chicago: Rand McNally, 1967). The subtitle seems ironic given the pluralist attempts to reduce the significance of both conflict and dissent in American politics. Dahl republished this work five years later under the new title *Democracy in the United States: Promise and Performance*. In his preface to the substantially revised second edition, Dahl wrote that “it has become more and more clear to me that the words *pluralist democracy* in the original title caused more readers than I had expected to misunderstand some aspects of that book.” Ibid., vii. This was at best a partial explanation for the title change: Dahl also retreated significantly from some of his earlier pluralist claims.

which is or can be wholly sovereign” were “[t]he fundamental axiom in the theory and practise of American pluralism.”²⁹⁸ This premise meant that “[b]ecause one center of power is set against another, power itself will be tamed, civilized, controlled, and limited to decent human purposes, while coercion, the most evil form of power, will be reduced to a minimum.”²⁹⁹

Dahl recognized that in polyarchies, “a great many questions of policy are placed in the hands of private, semipublic, and local governmental organizations such as churches, families, business firms, trade unions, towns, cities, provinces, and the like.”³⁰⁰ But his list left curiously ambiguous which entities were “private” and which were “semipublic.” Further, Dahl seemed overly sanguine in his assessment that “whenever a group of people believe that they are adversely affected by national policies or are about to be, they generally have extensive opportunities for presenting their case and for negotiations that may produce a more acceptable alternative.”³⁰¹ Like earlier pluralists, Dahl generally failed to account for the kinds of public power now dissipated among private groups. Thus, for example, he contended that most conflict between groups would be resolved not by coercion but by “peaceful adjustment.”³⁰²

Some of Dahl’s claims about the “extensive opportunities” for negotiations and prospects for “peaceful adjustment” seemed terribly at odds with events unfolding in

²⁹⁸Dahl, *Pluralist Democracy in the United States*, 24..

²⁹⁹Ibid.

³⁰⁰Dahl, *Democracy in the United States*, 41-42.

³⁰¹Ibid., 42.

³⁰²Robert Dahl, *Modern Political Analysis* (Englewood Cliffs: Prentice-Hall, 1963), 73.

American society like civil rights sit-ins, campus activism, and protests against the Vietnam War. But as John Gunnell writes, the behavioralism popularized by Dahl meant that “[a]t the very historical moment that events such as [these] were taking place, political science research seemed to ignore these matters in favor of the study of such things as voting.”³⁰³ The pluralist narrative that power dispersed among groups led to a balanced equilibrium resonated with the statistically driven methods that had entered the discipline of political science. Pluralists, like many of their quantitative heirs in political science today, believed that by identifying the proper data and methodology, politics could be reduced to a system of solvable equations. Because equations balanced and followed logical patterns, then so must the forms of power that pluralists observed in groups.

2. *The Pluralist Consensus*

Even more pronounced than the pluralist gloss on balance was its assumed consensus of democratic beliefs and values. The beginnings of this consensus narrative emerged in the era of industrialization. The economic focus of progressive reforms of the early twentieth century had led to “a belief in the capacity of American abundance to

³⁰³Gunnell, *Descent of Political Theory*, 263. Cf. *ibid.*, 106 (the controversy about “state and pluralism” was “in the end, one about the identity of political theory and political science”). These trends in some ways continue today, with graduate work in political science increasingly focused on mastering statistical techniques and formal modeling, to the detriment of substantive knowledge about and awareness of contemporary political practices and institutions. Cf. Powe, *The Warren Court and American Politics*, xii (“There was a time when political scientists had as much interest in the Court as did academic lawyers and when the major journals of political science regularly published articles in this genre. . . . Today a nonquantitative article on the Supreme Court and politics in a political science journal would stick out like an article on physics in a law journal.”).

smooth over questions of class and power by creating a nation of consumers.”³⁰⁴ In Alan Brinkley’s assessment, liberal reformers were confident “that their new consumer-oriented approach to political economy had freed them at last from the need to reform capitalist institutions and from the pressure to redistribute wealth and economic power.”³⁰⁵

The pluralist consensus can be traced to Bentley, who asserted that all struggles between groups proceeded within a “habit background.”³⁰⁶ These constraints limited “the technique of the struggle” employed by groups such that “when the struggle proceeds too harshly at any point there will become insistent in the society a group more powerful than either of those involved which tends to suppress the extreme and annoying methods of the groups in the primary struggle.”³⁰⁷ These background assumptions had a tremendous normalizing effect: “It is within the embrace of these great lines of activity that the smaller struggles proceed, and the very word struggle has meaning only with reference to its limitations.”³⁰⁸ As Myron Hale concluded: “Bentley’s science of politics ended in a science of control within a closed system.”³⁰⁹

³⁰⁴Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Knopf, 1995), 226.

³⁰⁵*Ibid.*, 271.

³⁰⁶Bentley, *The Process of Government*, 372.

³⁰⁷*Ibid.*, 372.

³⁰⁸*Ibid.*

³⁰⁹Myron Hale, “The Cosmology of Arthur F. Bentley,” in *The Bias of Pluralism*, ed. William Connolly (New York: Atherton Press, 1971), 45.

Bentley's early hints at a consensus narrative were only later adopted by postwar pluralists. But the idea of consensus was in the air elsewhere in American political thought. Writing in 1939, John Dewey concluded that American culture had produced "a basic consensus and community of beliefs."³¹⁰ Fourteen years later, Daniel Boorstin echoed Dewey in heralding the national consensus of liberal values as part of the "genius of American politics."³¹¹ The growing consensus was also buttressed by historians like Louis Hartz, whose 1955 *The Liberal Tradition in America* argued that the "moral unanimity" of Americans stemmed from a "nationalist articulation of Locke" that had been the only significant intellectual influence upon the American Founders.³¹² While earlier historians like Charles Beard had focused on tensions arising from class distinctions, mid-twentieth century scholarship heralded "the consensus, rather than the conflict, between Americans."³¹³ By the late 1950s, the consensus surrounding the liberal endorsement of a welfare and labor system predicated on a fundamental belief in

³¹⁰John Dewey, *Freedom and Culture* 134, 175 (New York: G.P. Putnam, 1939).

³¹¹Daniel Boorstin, *The Genius of American Politics* (Chicago: University of Chicago Press, 1953). Boorstin claimed that "we all actually have a common belief, have glossed over sectarian differences in religion and produced a kind of generalized, non-denominational faith" and "this kind of faith, taken together with the lack of distinctions in our political philosophy, has tended to break down the boundaries between religious and political thought." Ibid., 162.

³¹²Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt, 1955), 11. Hartz's book began with an epigram from *Democracy in America* and praised Tocqueville for "a series of deep insights into the American liberal community." Ibid., i, 31.

³¹³Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), 23. Charles Beard's famous study is *An Economic Interpretation of the Constitution of the United States* (New York: MacMillan, 1913).

the capitalist state was pervasive enough for Daniel Bell to declare the “end of ideology.”³¹⁴

Truman’s *The Governmental Process* suggested that as important as organized groups were “potential” groups that reflected “those interests or expectations that are so widely held in the society and are so reflected in the behavior of almost all citizens that they are, so to speak, taken for granted.”³¹⁵ These “widely held but unorganized interests” constituted the “rules of the game.”³¹⁶ And the rules of the game enforced by unorganized interests constrained the practices of organized interests.³¹⁷ In other words, a sufficiently homogenous background consensus shared by all citizens not only sustained the public order (which, for Truman, included “reinforcing widely accepted norms of ‘public morality’”), but also bounded the extent to which groups diverged from that shared consensus.³¹⁸ Broad compliance was critical because “the existence of the state, of the polity, depends on widespread, frequent recognition and conformity to the claims of these unorganized interests and on activity condemning marked deviations from

³¹⁴Daniel Bell, *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties* (Glencoe, IL: Free Press, 1960). Bell argued that the changing face of the American labor movement no longer evoked calls to Marxism or other ideologies. Ibid.

³¹⁵Truman, *The Governmental Process*, 506. Potential groups didn’t require a physical association because “[i]f the claims implied by the interests of these potential groups are quickly and adequately represented, interaction among those people who share the underlying interests or attitudes is unnecessary.” Ibid.

³¹⁶Ibid., 506-07.

³¹⁷The rules of the game were “dominant with sufficient frequency in the behavior of enough important segments of the society” that “both the activity and the methods of organized interest groups are kept within broad limits.” Ibid., 515.

³¹⁸Ibid., 514.

them.”³¹⁹ The rules of the game gave politics a “sense of justice,” and violating them “normally will weaken a group’s cohesion, reduce its status in the community, and expose it to the claims of other groups.”³²⁰

But Truman also recognized that his balance wheel would encounter friction resulting from differences in group experiences, frames of reference, and “rationalizations.”³²¹ To illustrate how the normative effects of a group on its members could lead to beliefs outside of the mainstream, Truman posited the example of military training:

A group of professional military officers, recruited at an early age, trained outside of civilian institutions, and practising the profession of arms in comparative isolation from other segments of the society, easily may develop the characteristics of a caste. Such a group not only will generate its own peculiar interests but also may arrive at interpretations of the “rules of the game” that are at great variance with those held by most of the civilian population. In such a case multiple membership in other organized groups is slight and that in potential widespread groups is unlikely.³²²

For Truman, this unattended divergence from the rules of the game threatened the health of democracy, and it was advancing within groups far less innocuous than the United States military. Communist organizations provided one example of worrisome groups falling outside of the consensus. The rise of the Civil Rights movement in the South provided another:

The emergence in the disadvantaged classes of groups that reflect materially different interpretations of the widespread interests may

³¹⁹Ibid., 515.

³²⁰Ibid., 512, 513, 515 and n.15.

³²¹Ibid., 520.

³²²Ibid., 521.

encourage conflict and at the same time provide an inadequate basis for peaceful settlement. The appearance of groups representing Negroes, especially in the South, groups whose interpretations of the “rules of the game” are divergent from those of the previously organized and privileged segments of the community, are a case in point.³²³

Truman believed that widespread divergence could be mitigated because the rules of the game could be “acquired by most individuals in their early experiences in the family, in the public schools (probably less effectively in the private and parochial schools), and in similar institutionalized groups that are also expected to conform in some measure to the ‘democratic mold.’”³²⁴ He didn’t expressly acknowledge it, but the imposition of a “democratic mold” collapsed pluralism into a position similar to the state-centered idealism that it had originally challenged: lurking behind a seemingly benign agreement of values was the normative (and coercive) association of the state. As Earl Latham observed in 1952, the state was the “custodian of the consensus” and “helps to formulate and to promote normative goals, as well as to police the agreed rules.”³²⁵ Reflecting the degree to which pluralism had diverged from its initial anti-statist claims, Latham continued that “[i]n the exercise of its normative functions,” the state “may even require the abolition of groups or a radical revision of their internal structure.”³²⁶

Like other pluralists who had preceded him, Dahl placed American politics within a broad consensus:

³²³Ibid., 523.

³²⁴Ibid., 513.

³²⁵Latham, “The Group Basis of Politics,” 384. The state “establishes the norms of permissible behavior in group relations, and it enforces these norms.” Ibid, 383. For Latham, this normative role of the state ultimately traced to its laws, which required “popular consent and understanding” to be effective. Ibid., 389.

³²⁶Ibid.

Prior to politics, beneath it, enveloping it, restricting it, conditioning it, is the underlying consensus on policy that usually exists in the society among a predominant portion of the politically active members. Without such a consensus no democratic system would long survive the endless irritations and frustrations of elections and party competition. With such a consensus the disputes over policy alternatives are nearly always disputes over a set of alternatives that have already been winnowed down to those within the broad area of basic agreement.³²⁷

For Dahl, this consensus was not a normative aspiration but an empirical fact.³²⁸ Under his influence, methodological assumptions set the rules of debate over what counted as politics and scholarship on politics, and in this way, behavioralists enforced their own normative consensus on political thought. The dominance of research paradigms buttressed normative claims, and consensus about methodology uncritically reinforced consensus about substance.

Dahl argued that the pluralist consensus included “a belief in democracy as the best form of government, in the desirability of rights and procedures insuring a goodly measure of majority rule and minority freedom, and in a wide but not necessarily comprehensive electorate.”³²⁹ Writing in 1961, he asserted that: “To reject the democratic creed is in effect to refuse to be an American. As a nation we have taken great pains to insure that few citizens will ever want to do anything so rash, so preposterous—in fact, so wholly un-American.”³³⁰

³²⁷Dahl, *A Preface to Democratic Theory*, 132-33.

³²⁸The influence of behavioralism convinced Dahl and other pluralists that their functionalist account of democracy honored the fact-value distinction exalted by positivist thought.

³²⁹Robert Dahl, *Who Governs?: Democracy and Power in an American City* (New Haven: Yale University Press, 1961), 316.

³³⁰*Ibid.*, 317.

Dahl believed that the “ideological convergence reflecting a wide acceptance by Americans of their institutions” made it “extraordinarily difficult (and, up to now, impossible) to gain a big public following for a movement that openly seeks comprehensive, radical, or revolutionary changes in a large number of American institutions.”³³¹ As a result, “radical movements” had been wholly ineffective in American politics:

Throughout the history of the United States, political life has been almost completely blanketed by parties, movements, programs, proposals, opinions, ideas, and an ideology directed toward a large mass of convergent “moderate” voters. The history of radical movements, whether of right or left, and of antisystem parties, as they are sometimes called, is a record of unrelieved failure to win control over the government.³³²

But as long as groups operated within the boundaries of consensus, Dahl believed that the American political system provided “a high probability that any active and legitimate group will make itself heard effectively at some state in the process of decision.”³³³

The consensus assumption of pluralism laid the foundation for the freedom of association in two ways. First, it established an implicit expectation that groups were valuable to democracy only to the extent that they reinforced and guaranteed democratic premises. The corollary to this claim meant that groups antithetical to these premises were neither valuable to democracy nor worthy of its protections. Second, because the consensus excluded groups beyond the margins of acceptability, the pluralist gloss on the groups that remained within its boundaries was unqualifiedly positive. Groups were not

³³¹Dahl, *Democracy in the United States*, 52.

³³²*Ibid.*, 50.

³³³Dahl, *A Preface to Democratic Theory*, 150.

only fundamental to American politics, but they created harmony and balance through reasoned and appropriately constrained disagreement.

The idea that groups were valuable to democracy only to the extent that they supported democracy was bereft of either authority or tradition in American politics. There were, of course analogies to totalitarianism, but pluralists were attempting to define themselves in opposition to the oppressive tendencies they observed in European politics. To substantiate their views about consensus and power, they needed to appeal to the American context. On the subject of groups and associations, Madison and Tocqueville were the obvious candidates.

C. Pluralist Interpretations of Madison and Tocqueville

Madison had argued in *Federalist* No. 10 that one of the most important advantages of “a well constructed union” was its “tendency to break and control the violence of faction.”³³⁴ The “latent causes of faction” were “sown in the nature of man.”³³⁵ As Madison elaborated:

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for preeminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good.³³⁶

³³⁴Madison, “Federalist No. 10.”

³³⁵*Ibid.*

³³⁶*Ibid.*

Factions, by Madison's definition, were adverse "to the permanent and aggregate interests of the community."³³⁷

Pluralists looking back at Madison through the lens of the presumed consensus of mid-twentieth century America read his negative connotations out of the *Federalist*.

Truman, for example, suggested that Madison's factions "carry with them none of the overtones of corruption and selfishness associated with modern political groups."³³⁸

Theodore Lowi charged that Truman's reasoning turned Madison on his head:

Note, for example, the contrast between the traditional and the modern definition of the group: Madison in *Federalist 10* defined the group ("faction") as "a number of citizens, whether amounting to a majority or minority of the whole who are united and actuated by some common impulse of passion, or of interest, *adverse to the right of other citizens, or to the permanent and aggregate interests of the community.*" Modern political science usage took that definition and cut the quotation just before the emphasized part. In such a manner, pluralist theory became the handmaiden of interest-group liberalism, and interest-group liberalism became the handmaiden of modern American positive national statehood.³³⁹

³³⁷Ibid., Cf. Bernard Brown, "Tocqueville and Publius," in *Reconsidering Tocqueville's Democracy in America*, ed. Abraham Eisenstadt (New Brunswick: Rutgers University Press, 1988), 48 (Madison "postulates a critical difference between faction (even when it is embodied by a majority) on the one hand and justice or the public good on the other. Throughout *The Federalist* the warning is sounding that the immediate interests of individuals as well as of majorities may not further the long-term good of the collectivity.").

³³⁸Truman, *The Governmental Process*, 6. Cf. Paul F. Bourke, "The Pluralist Reading of James Madison's Tenth Federalist," *Perspectives in American History* 9 (1975): 272 ("Madison's discussion of faction and interest establishes the close fit of modern pluralist theory and the wider American political culture.").

³³⁹Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: Norton, 1979), 55. Cf. *ibid.*, 36 (in contemporary pluralism, "[g]roups became virtuous; they must be accommodated, not regulated").

Unlike Truman, Dahl recognized Madison's belief "that a faction will produce tyranny if unrestrained by external checks."³⁴⁰ But Dahl misread Madison's apprehension to pertain solely to "majority factions."³⁴¹ Although nothing in Madison's account assigned an inherently positive value to divided interests, Dahl contended that "no political group has ever admitted to being hostile to" the "permanent and aggregate interests of the community."³⁴² Rather, the "numerous, extended, and diverse" minority interests were part of "the restraints on the effectiveness of majorities imposed by the facts of a pluralistic society."³⁴³ These varied interests operated within a broad consensus and posed no inherent danger to democracy. Dahl thought that Madison had underestimated "the importance of the inherent social checks and balances existing in every pluralistic society" that came through these interests.³⁴⁴ Madison had not appreciated "the role of social indoctrination and habituation in creating attitudes, habits, and even personality types requisite to a given political system."³⁴⁵

Lance Banning argues that the "pluralist misreading" of *Federalist* No. 10 attained its "widest influence" through Dahl.³⁴⁶ The "cruder forms" of this misreading suggested "that Madison delighted in the clash of special interests and identified the

³⁴⁰Dahl, *A Preface to Democratic Theory*, 15.

³⁴¹*Ibid.*, 26.

³⁴²*Ibid.* (quoting *Federalist* No. 10).

³⁴³*Ibid.*, 29.

³⁴⁴*Ibid.*, 22.

³⁴⁵*Ibid.*, 18.

³⁴⁶Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca: Cornell University Press, 1995), 205.

outcome of such clashes with the public good.”³⁴⁷ Quoting Daniel Walker Howe, Banning notes that “[f]action’ was not a value-free concept for Publius; a faction was by definition evil.”³⁴⁸ Madison biographer Ralph Ketcham also dissents “from the view that sees Madison, especially in his tenth *Federalist Paper*, as validating modern conflict-of-interest politics.”³⁴⁹ By disregarding the dangers inherent in minority factions, pluralism transformed Madison’s faction into a domesticated group whose interests were broadly aligned with those of the modern liberal state.³⁵⁰

Unlike Madison, Tocqueville drew no negative conclusions about “voluntary associations.”³⁵¹ He instead “subverted” Madison’s analysis of factions and “regarded associations as a valuable way of connecting people by overcoming some effects of

³⁴⁷Ibid. Cf. Brown, “Tocqueville and Publius,” 45-46 (suggesting that Dahl reads *The Federalist* to reflect “the ideology of a wealthy and advantaged elite”).

³⁴⁸Banning, *The Sacred Fire of Liberty*, 205.

³⁴⁹Ralph Ketcham, *James Madison*, 2nd Edition (Charlottesville: University of Virginia Press, 1990), ix. Ketcham makes this assertion in the preface to the second edition of his monumental biography of Madison, elaborating that “[p]recisely because Madison was so firmly grounded in classical and Augustan thought, he saw faction (and its eighteenth-century synonym, party) as a malignant opposite to ‘the permanent and aggregate interests of the community,’ a concept foreign to modern conflict-of-interest theory.” Ibid.

³⁵⁰Cf. Lowi, *The End of Liberalism*, 55 (making this distinction).

³⁵¹Tocqueville had carefully studied both *The Federalist* and Story’s *Commentaries on the Constitution*, the latter of which reproduced *Federalist* No. 10 in its entirety. Brown, “Tocqueville and Publius,” 43-45. Early in Book I of *Democracy in America*, he wrote in a footnote that he would “often have occasion to quote *The Federalist* in this work.” Tocqueville, *Democracy in America*, 134 n.8. He opined that “*The Federalist* is a fine book which, although it particularly concerns America, should be familiar to statesmen of all countries.” Ibid.

individualism.³⁵² Tocqueville's optimism stemmed in part from his idealized view of associations in America:

In America the citizens who form the minority associate, in order, in the first place, to show their numerical strength, and so to diminish the moral authority of the majority; and, in the second place, to stimulate competition, and to discover those arguments which are most fitted to act upon the majority; for they always entertain hopes of drawing over their opponents to their own side, and of afterward disposing of the supreme power in their name. Political associations in the United States are therefore peaceable in their intentions, and strictly legal in the means which they employ; and they assert with perfect truth that they only aim at success by lawful expedients.³⁵³

In other words, Tocqueville presupposed that associations in America would never seriously threaten the stability of government in America. He elaborated, tellingly, that “[i]n a country like the United States, *in which the differences of opinion are mere differences of hue*, the right of association may remain unrestrained without evil consequences.”³⁵⁴

Dahl believed that Tocqueville was “struck by the degree of political, social, and economic equality among Americans” and had “made this observation the very kernel of

³⁵²Sheldon Wolin, *Tocqueville Between Two Worlds: The Making of a Political and Theoretical Life* (Princeton: Princeton University Press, 2001), 240. See also Brown, “Tocqueville and Publius,” 53, 54 (Tocqueville thought that “men of virtue would filter the raw passions and demands of the people,” and “[t]hus would egoistic individualism (Madison’s factionalism) be transcended and an era of enlightened self-interest (Madison’s public good) ushered in.”); George Kateb, “Some Remarks on Tocqueville’s View of Voluntary Associations,” in *Nomos XI: Voluntary Associations*, ed. J. Roland Pennock and John W. Chapman (New York: Atherton Press, 1969), 142 (“The Madisonian vision of democratic politics as the struggle of potentially transgressive factions is absent from Tocqueville’s account.”).

³⁵³Tocqueville, *Democracy in America*, 203-04. Tocqueville’s conception of association also retained glimpses of the importance of face-to-face communication: association brought with it the “power of meeting” in which “men have the opportunity of seeing each other.” *Ibid.*, 198.

³⁵⁴*Ibid.*, 204 (emphasis added).

his famous analysis of American democracy.”³⁵⁵ He maintained, based on his reading of Tocqueville, that “Americans almost unanimously agree on a number of general propositions about democracy.”³⁵⁶ Writing in 1961, Dahl contended:

Throughout the country then the political stratum has seen to it that new citizens, young and old, have been properly trained in “American” principles and beliefs. Everywhere, too, the pupils have been highly motivated to talk, look and believe as Americans should. The result was as astonishing an act of voluntary political and cultural assimilation and speedy elimination of regional, ethnic, and cultural dissimilarities has history can provide. The extent to which Americans agree today on key propositions about democracy is a measure of the almost unbelievable success of this deliberate attempt to create a seemingly uncoerced nationwide consensus.³⁵⁷

Importantly, Dahl recognized that Tocqueville had written in a preindustrial era different than the current landscape:

The America that Tocqueville saw . . . was the America of Andrew Jackson. It was an agrarian democracy, remarkably close to the ideal often articulated by Jefferson. Commerce, finance, and industry erupted into this agrarian society in a gigantic explosion. By the time the [nineteenth] century approached its last decade, . . . the America of Tocqueville had already passed away.³⁵⁸

³⁵⁵Dahl, *Democracy in the United States*, 87. Dahl notes that African-Americans were an exception here but maintains that there was otherwise immense equality among the “free white population.” Ibid.

³⁵⁶Dahl, *Who Governs?*, 312. Dahl criticized Tocqueville’s argument “that the stability of the American democratic system depends . . . on an almost universal belief in the basic rules of the democratic game.” Ibid. But while Dahl highlighted disagreement over “specific applications” of democratic principles to “crucial cases,” he asserted a basic agreement about those principles.

³⁵⁷Ibid., 318.

³⁵⁸Ibid., 2. Cf. Dahl, *Democracy in the United States*, 89 (“The vast private corporations created by industrial capitalism had not yet arrived; the giant factories, the great financiers, the urban proletariat, the army of clerks and white-collar workers—these were still unknown.”).

But Dahl insisted that despite the growing inequality of resources following the changes in the early twentieth century, a “universal creed of democracy and equality” persisted in mid-twentieth century America.³⁵⁹

The pluralist appropriation of Tocqueville’s account of associations overlooked two complications. The first was that Tocqueville’s case study of America in the 1830s had focused on an extraordinarily homogenous population, thus giving him an overly sanguine view of harmony amidst difference. Rogers Smith has noted that Tocqueville and later accounts that drew upon him:

. . . center on relationships among a minority of Americans—white men, largely of northern European ancestry—analyzed in terms of categories derived from the hierarchy of political and economic status such men held in Europe: monarchs and aristocrats, financial and commercial burghers, farmers, industrial and rural laborers, indigents. Because most European observers and most white American men regarded these categories as politically basic, it is understandable that from America’s inception they thought that the most striking fact about the new nation was the absence of one specific type of fixed, ascriptive hierarchy. There was no hereditary monarchy or nobility native to British America itself, and the Revolution rejected both the authority of the British king and aristocracy and the creation of any new American substitutes. Those genuinely momentous features of American political life made the United States appear remarkably egalitarian in comparison to Europe.³⁶⁰

But as Smith observes, the “relative egalitarianism that prevailed among white men” left unaddressed immense inequities pertaining to gender, race, culture, religion, and sexual orientation.³⁶¹ When associations expanded to these interests—as they increasingly did by the mid-twentieth century—differences of opinion were no longer merely differences

³⁵⁹Dahl, *Who Governs?*, 3

³⁶⁰Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), 17.

³⁶¹*Ibid.*

of hue, and Tocqueville's ideal theory lost its descriptive purchase. Pluralists to a large degree failed to recognize the limits of Tocqueville's understanding of equality and as a result adopted an understanding of balance and consensus that excluded significant classes of people from its description of the political process. As Grant McConnell argued: "... farm migrant workers, Negroes, and the urban poor have not been included in the system of 'pluralist' representation so celebrated in recent years."³⁶² McConnell insisted that: "However much these groups may be regarded as 'potential interest groups,' the important fact is that political organization for their protection within the pluralist framework can scarcely be said to exist."³⁶³

The second problem with relying on Tocqueville to buttress pluralist accounts of mid-twentieth century America was the degree to which the relationship between public and private had been radically altered in the years since *Democracy in America*. Tocqueville had assumed a political order bifurcated between a relatively limited government (which exercised law, authority, and coercion), and a larger sphere that consisted of nongovernmental social and economic relations.³⁶⁴ The theoretical impetus for this split came from a Lockean liberalism whose "most distinctive feature" was "its insistence that government should be limited so as to free individuals to undertake private

³⁶²Ibid., 349.

³⁶³Ibid. Cf. Ibid., 358 ("Federalism and interest group 'pluralism' with which it is associated today are instruments of conservatism and particularism. The ideology of 'grass roots democracy' and the gradual growth of power in small units by the institutional processes of accommodation have probably betrayed us into yielding too much of the republic's essential values of liberty and equality.").

³⁶⁴Cf. Mark E. Warren, *Democracy and Association* (Princeton: Princeton University Press, 2001) ("because [Tocqueville's] bipolar state-civil society model fails to conceive economic and social power effects, it produces a limited conception of what counts as 'political.'").

as well as public pursuits of happiness, even if this option erodes public spiritedness in practice.”³⁶⁵ The separation of public and private by Locke and other classical liberals created a sphere autonomous from government control. But it also tacitly granted greater political legitimacy to the public realm, a realm that soon became synonymous with the state.

This conceptual framework was not especially problematic when the right of assembly entered the American constitutional scheme through the First Amendment. In 1791, the state was relatively limited in scope and left a broad non-public realm free from coercive regulation.³⁶⁶ The extent to which early American citizens viewed this non-public realm as “private” is difficult to pinpoint, but it is sufficient to observe that they believed it fell outside of the relatively limited public controlled by government. But while the early assemblies may have been separated from public power, they were nonetheless public in the sense of being visible to others and political in the sense of demonstrating and advocating an alternative way of life. The Democratic-Republican Societies gathered and feasted and paraded, suffragist groups formed conventions and marches, and abolitionists rallied citizens to awareness and action.

The early American understanding of public and private for the most part endured at the time of Tocqueville’s visit to the United States. Tocqueville believed that citizens in Jacksonian democracy conceived of a narrow public realm confined to governmental functions: “[i]n the American republics the activity of the central Government never as

³⁶⁵Rogers M. Smith, *Liberalism and American Constitutional Law* (Cambridge: Harvard University Press, 1985), 14.

³⁶⁶An important exception to the separation of public and private that I am describing was the role of state-sponsored churches in some areas of the country.

yet has been extended beyond a limited number of objects sufficiently prominent to call forth its attention.”³⁶⁷ Because he viewed the nongovernmental sphere as more determinative in shaping the lives and values of citizens than the more narrowly defined “government,” he saw associations as necessary to maintaining democratic order through civic virtue.³⁶⁸

The difficulty in the pluralist adaptation of Tocqueville’s framework was that what was considered within the reach of “government” or “public” in mid-twentieth century America was far greater than Tocqueville had ever conceived. The growth of the market economy had initially reinforced Lockean understandings of public and private.³⁶⁹ But unprecedented advances in industrialization and bureaucracy that led to quasi-public corporations eventually rendered obsolete simplistic dualisms of public and private. Early twentieth-century legal thinkers began to question the assumption that “private law could be neutral and apolitical” amidst “a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to

³⁶⁷Tocqueville, *Democracy in America*, Vol. I., 290. For example, the nation that Tocqueville observed in 1830 had fewer than 12,000 federal employees (almost 9,000 of whom worked for the Post Office) out of a population of over thirteen million. Dahl, *Pluralist Democracy in the United States*, 60-61.

³⁶⁸As Mark Warren has written, “Tocqueville linked capacities for mediation and representation to civic habits developed within the associational fabric of civil society, which he in turn related to a strong meaning of democracy located in associational capacities for collective action.” Warren, *Democracy and Association*, 30.

³⁶⁹As Morton Horwitz suggests, it was “[t]he emergence of the market as a central legitimating institution” that “brought the public/private distinction into the core of legal discourse during the nineteenth century.” Morton J. Horwitz, “The History of the Public/Private Distinction,” *University of Pennsylvania Law Review* 130 (1981): 1424. Horowitz elaborates that “[o]ne of the central goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial law.” *Ibid.*

governments.”³⁷⁰ Legal realists characterized “the distinction in classical liberalism between private and public law as arbitrary, demonstrating that all private transactions involved the state and that all law was, in an important sense, public law.”³⁷¹

Following these realist premises, New Deal reformers invaded the private realm with governmental programs, regulations, and bureaucrats. The New Deal assumed that “the instruments of government provided the means for conscious inducement of social change” and established “an indeterminable but expanding political sphere.”³⁷² The Supreme Court mounted a spirited but short-lived resistance to this ideology in the mid-1930s, and a decade later the Court embraced the new liberalism. In 1948, the Court evidenced its acceptance of regulation of economic activity in *Shelley v. Kraemer*, which placed private contracts and covenants within the scope of the Fourteenth Amendment.³⁷³

At the same time that the government expanded its reach into previously private domains, corporations, universities, and unions grew in number and size and increasingly assumed quasi-governmental functions. In Henry Kariel’s description, “[o]rganizational giants such as General Motors, the Teamsters Union, the Farm Bureau, and the American

³⁷⁰Ibid., 1426, 1428.

³⁷¹Kalman, *The Strange Career of Legal Liberalism*, 17.

³⁷²Lowi, *The End of Liberalism*, 42, 43. Cf. Theodore Lowi, “The Public Philosophy: Interest-Group Liberalism,” *American Political Science Review* 61 (1967): 6 (“Once the principle of positive government in a growing and indeterminable political sphere was established, criteria arising out of the very issue of *whether* such a principle should be established became extinguished. They were extinguished by the total victory of one side of the old dialogue over the other.”)

³⁷³*Shelley v. Kraemer*, 334 U.S. 1 (1948). The Court concluded that state enforcement of property and contract laws qualified as “state action” for the purposes of the Fourteenth Amendment, thereby requiring states to outlaw any “private” act of racial discrimination that relied on these market laws for its enforceability. Ibid., 22-23.

Medical Association . . . emerged as full-fledged political regimes” and blurred “the formerly useful distinction between the public and the private.”³⁷⁴ Even as the pluralist critique of state-centered theory redirected the study of politics toward the group, “the discovery that precious little in human life is immune to bureaucratization . . . dispelled some of the magic of the group.”³⁷⁵ The giant private bureaucracies were not akin to “that wonderful and wholly legitimate conglomeration of little groups which visitors from abroad [had] traditionally identified with Americanism.”³⁷⁶ They were rather “a newer set of large-scale organizational power blocs” that had come to “comprise most of the public order and occupy much of the public mind.”³⁷⁷ Dewey suggested an “eclipse of the public” had created “many publics.”³⁷⁸

Tocqueville had seen only one public, and its normative influence had been overshadowed by the private associations that he observed. By the middle of the twentieth century, that was no longer the case. The conception of “public” had moved in two directions. First, the increased role of government as welfare provider had expanded the governmental public realm into previously private domains. Second, private organizations had grown closer to coercive government in form and substance as they took on more public functions. Lost in this mix was a subtle transformation in the understanding of the “political,” which by the middle of the twentieth century had been

³⁷⁴Henry Kariel, *The Decline of American Pluralism* (Stanford: Stanford University Press, 1961), 1, 10.

³⁷⁵Sheldon Wolin, *Politics and Vision* (Princeton: Princeton University Press, 2004), 374.

³⁷⁶Kariel, *The Decline of American Pluralism*, 2.

³⁷⁷*Ibid.*

³⁷⁸John Dewey, *The Public and Its Problems* (New York: Henry Holt, 1927) 126, 137.

confined to those “interests” and “pressure groups” directly engaged with governmental processes. That characterization was doubly problematic: it kept hidden groups exerting economic coercion in the private sector but at the same time depoliticized groups that were neither governmental nor economic. Truman and Dahl recognized the changing roles of public and private, but they largely embraced the New Deal expansion as an unqualified good and interpreted the public infusion into private organizations as a favorable dissipation of public power.

Critics soon exposed the pluralist oversights. In 1966, Grant McConnell’s *Private Power and American Democracy* challenged the “comfortable assumption that interest groups will balance each other in their struggles and produce policies of moderation.”³⁷⁹ McConnell questioned the pluralist assumption that “private associations” were, in fact, private. He argued that the facile distinction between “public” and “private” had “been seriously blurred in recent years.”³⁸⁰ McConnell suggested that the infusion of quasi-public authority upon private associations could not be ignored: “[w]hen, under the guise of serving an ideal of democracy as the self-government of small units, the coercive

³⁷⁹McConnell, *Private Power and American Democracy*, 362.

³⁸⁰Ibid., 146. Cf. *ibid.*, 362 (The government can be neither arbiter nor mediator when “the distinction between public and private is lost.”). For example, the 1933 National Industrial Recovery Act and the 1935 Wagner Act bestowed upon labor unions “a substantial measure of public power.” Ibid., 146. Professional and trade associations had been “given the power to nominate personnel, virtually as a form of representation, to official licensing boards” and “on occasion, to policy-making boards.” Ibid., 147. And “private” associations like the American Farm Bureau Federation and the Chamber of Commerce of the United States had “direct government encouragement in their formation.” Ibid.

power of public authority is given to these groups, their internal government becomes a matter of serious concern.”³⁸¹

McConnell also challenged the pluralist balance assumption “that private associations are mutually countervailing,” which he viewed as a “a modern gloss on the argument of Madison and his colleagues in the Federalist Papers.”³⁸² The pluralist account suggested that “by opposing each other, private associations supposedly check any overly greedy attempts by particular associations to extend their power” such that “in the large community democracy is insured.”³⁸³ McConnell responded that in practice, “private associations tend to be jealous of rivals.”³⁸⁴ These associations “seek to prevent the rise of competitors in the fields they have marked as their own” and “[o]ften, when such rivals do exist, there is bitter conflict between them, conflict that has as its object the destruction of one or the other.”³⁸⁵

Other challenges to pluralist arguments came from Michael Rogin, Theodore Lowi, and William Connolly. Rogin argued that the pluralist theory of group politics had reintroduced “social cohesion in a constitutional, industrial society.”³⁸⁶ This underlying

³⁸¹Ibid., 341-42.

³⁸²Ibid., 123.

³⁸³Ibid.

³⁸⁴Ibid., 124.

³⁸⁵Ibid.

³⁸⁶Michael Paul Rogin, *The Intellectuals and McCarthy: The Radical Specter* (Cambridge: M.I.T. Press, 1967), 10. Pluralism was “not simply a defense of shared power or a sympathy for diverse values” but also a “theory of history in which industrialization is the major actor.” Ibid., 10. Industrialization had destroyed “traditional stability,” but its success “enable[d] group politics to dominate a society.” Ibid.

“[s]ocial consensus plays an overwhelming role in the pluralist vision” and had “define[d] out of existence any conflict between groups and the public interest.”³⁸⁷ Lowi contended that Dahl’s conception “relie[d] on an extremely narrow definition of coercion, giving one to believe that coercion is not involved if physical force is absent” and “depend[ed] on an incredibly broad and idealized notion of what is peaceful about peaceful adjustment.”³⁸⁸ Lowi charged that ignoring these complexities meant that “interest group liberalism” helped create “the sense that power need not be power at all, control need not be control, and government need not be coercive.”³⁸⁹ Connolly similarly asserted that pluralists like Dahl had disregarded “notable discontinuities” between the conditions of postwar American society and the “basic preconditions to the successful operation of pluralist politics” that Tocqueville had stipulated.³⁹⁰ For example, Connolly suggested that “the emergence of the large-scale, hierarchical organization has

³⁸⁷Ibid., 271, 16. Rogin elaborated that “Since groups are “shared attitudes,” all political actors can be called groups. Since versions of the public interest can only be rationalizations for group goals, the public interest cannot exist apart from group interests.” Ibid., 16. But the consensus was markedly circular: pluralist theory recognized as legitimate only those group leaders “socialized into the dominant values and associations of industrial society.” Ibid., 10.

³⁸⁸Lowi, *The End of Liberalism*, 38.

³⁸⁹Ibid., 55. Lowi explained that interest group liberalism: “is liberalism because it is optimistic about government, expects to use government in a positive and expansive role, is motivated by the highest sentiments, and possesses a strong faith that what is good for government is good for the society. It is interest-group liberalism because it sees as both necessary and good a policy agenda that is accessible to all organized interests and makes no independent judgment of their claims. It is interest-group liberalism because it defines the public interest as a result of the amalgamation of various claims.” Ibid., 51.

³⁹⁰William Connolly, “The Challenge to Pluralist Theory,” in *The Bias of Pluralism*, ed. William Connolly (New York: Atherton Press, 1971), 5.

significantly altered the character of the voluntary association” since the time of Tocqueville’s writing.³⁹¹

As the critics intimated, because pluralist theory of the 1950s assumed the status quo of an enlarged public sphere, its endorsement of group sovereignty was really epiphenomenal to a further legitimization of the public welfare function of the state and the increasingly bureaucratized corporations and universities that mimicked state functions and organization.³⁹² The blending and overlap of public and private fundamentally altered the political arrangements about which Tocqueville and Madison had theorized. Contrary to some pluralist beliefs, dispersed power didn’t disappear or dissipate; it just became less visible.

E. THE TYRANNY OF THE MAJORITY

It is important to note that while Madison and Tocqueville held different views about the inherent nature of groups, both theorists turned to groups as a check against majority rule. Madison thought that majorities could be “unjust and interested” and sacrifice to their “ruling passion or interest both the public good and the rights of other citizens.”³⁹³ He relied on factions to ensure that a majority would be “unable to concert and carry into effect schemes of oppression.”³⁹⁴ Tocqueville warned similarly of the

³⁹¹Ibid. Connolly suggests that Madison and Tocqueville provided the “intellectual springboards” for many pluralist thinkers. Ibid., 4.

³⁹²See generally, Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, 2004), 315-92, 557-606.

³⁹³Madison, “Federalist No. 10.” Cf. Wolin, *Tocqueville Between Two Worlds*, 248.

³⁹⁴Madison, “Federalist No. 10.”

“tyranny of the majority.”³⁹⁵ He contended that the majority “often has despotic tastes and instincts,” and he called the “omnipotence of the majority” the “greatest danger for American Republics.”³⁹⁶ As Sheldon Wolin suggests, by the second volume of *Democracy in America*, Tocqueville had moved away from concern over an explicitly legislative imposition of majority will to a more nuanced form of cultural hegemony.³⁹⁷ Wolin surmises that for Tocqueville:

The danger was not that a legislative majority might ride roughshod over minority rights but a strange lack of opposition to the dominant set of values—and this despite an unprecedented degree of liberty and fully guaranteed rights of expression. He insisted that there was no country in which there was less intellectual independence and freedom of discussion than in America. His explanation was that in a democracy the majority combined physical, moral, and legal authority. Democracy’s vaunted inclusiveness did not extend to the critic who espoused unorthodox views; he would eventually feel the whole weight of the community against him.³⁹⁸

Madison and Tocqueville implicitly recognized that the capacity for groups to exist detached from and even antithetical to the will of the majority in some ways reflected an anti-democratic freedom. Mid-twentieth century pluralism never acquiesced in this description, but I think it is exactly right: group autonomy presupposes the risk of volatile disagreement rather than stability to the democratic experiment.

That risk went largely unacknowledged by the pluralist political thought that pervaded the background in which the constitutional freedom of association emerged.

³⁹⁵Tocqueville, *Democracy in America*, 305.

³⁹⁶Ibid., 305-06, 303. Wolin believes that Tocqueville “concluded that in America there were insufficient legal safeguards against the tyranny of the majority.” Wolin, *Tocqueville Between Two Worlds*, 250.

³⁹⁷Wolin, *Tocqueville Between Two Worlds*, 251.

³⁹⁸Ibid., 250-51.

The pluralist consensus assumption established boundaries within which measured disagreement could unfold but through which dissenting voices were marginalized or silenced. The pluralist balance assumption asserted a harmonious stability between those associations that remained within the consensus boundaries. Together, consensus and balance depoliticized political dissidents and disguised political power. The result provided an explanation for a stable democratic polity, but it was a skewed explanation. Pluralists (and Supreme Court justices) exalted associational autonomy largely because the associations accepted by the consensus neither threatened democratic stability nor diverged from democratic values.

F. CONCLUSION

In the next chapter, I will explore the transformation of the right of association during the equality era, including the important case of *Roberts v. United States Jaycees*, decided by the Court in 1984. That transformation, I will argue, has contributed to a significant weakening of group autonomy and deepened the chasm between the contemporary freedom of association and the historical right of assembly. But what has not been fully recognized about the current vulnerability of associations is the degree to which the current predicament owes in part to the factors influencing the original recognition of the right of association—and its departure from the freedom of assembly—fifty years ago. The three factors that I have suggested shaped the right of association in *NAACP v. Alabama* and subsequent cases in the 1960s in many ways paved the way for the transformation that occurred in *Roberts*. The largely unquestioned pluralist consensus that gave the Court its baseline for acceptable forms of association in the late 1950s and early 1960s opened the door for the egalitarianism that emerged in the 1970s and placed

certain discriminatory associations beyond its contours. The Court's disparate treatment of communist and civil rights associations in the 1950s and 1960s carved a path for later cases like *Roberts* to deny associational protections to certain kinds of groups even in the absence of any imminent threat to democratic security or stability. And the early jurisprudential arguments over the constitutional source of association facilitated Brennan's later distinction between a right of expressive association connected to the First Amendment and a right of intimate association tied to personal liberty. These developments have in some ways left group autonomy vulnerable to the tyranny of the majority.

III. The Transformation of Association in the Equality Era

I have termed the second constitutional epoch of the right of association the equality era. This era spans roughly from the mid-1960s to the end of the twentieth century.¹ It includes the transformation of the right of association into intimate and expressive components in *Roberts v. United States Jaycees*.² As I suggested at the end of the last chapter, this transformation in many ways took its cues from the foundations established during the national security era. But the equality era also introduced its own political, jurisprudential, and theoretical factors that influenced associational freedom. As in the previous chapter, I want to focus on one of each of these factors: (1) the pursuit of civil rights policy objectives through antidiscrimination legislation (a political factor); (2) the emergence of a constitutional right to privacy and the relationship between privacy and association (a jurisprudential factor); and (3) the prominence of Rawlsian

¹It is likely that the equality era of the right of association came to a close at the dawn of the twenty-first century amidst new concerns over domestic terrorism. The doctrinal implications of new laws governing the relationship between groups and the state remain to be seen. At a minimum, the clear and present danger standard appears to have reemerged with respect to claims of association by violent terrorist organizations. See, e.g., *United States v. Lindh*, "Government's Opposition to Defendant's Motion to Dismiss Counts Two Through Nine of the Indictment on Freedom of Association, Overbreadth and Vagueness Grounds," June 5, 2002. Cf. Kersch, "'Guilt By Association' and the Postwar Civil Libertarians," 74 ("the ongoing 'war on terror' raises many of the same questions that the mid-century civil libertarians grappled with during the height of the Cold War"). See also David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (New York: New Press, 2002).

²*Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

liberalism and the academic and popular debates that unfolded within its parameters (a theoretical factor). I will argue that each of these factors further contributed to the decline of group autonomy. Implicit in my historical narrative is my view that this decline is bad for liberalism, even when attributable to an increased recognition of other liberal values.

The primary political factor affecting the right of association in the equality era involved ongoing efforts to attain meaningful civil rights for African Americans. As the Civil Rights movement gained acceptance as part of the democratic creed, the focus of civil rights activists shifted from protecting their own associational freedom (as represented in the NAACP cases chronicled in the last chapter) to pursuing antidiscrimination objectives by challenging the “right to exclude” of segregationists. Questions about the limits of the right to exclude became increasingly complex when civil rights litigation moved from public to private associations.

The jurisprudential factor affecting the right of association in the equality era was the development of another constitutional right that appeared nowhere in the Constitution: the right to privacy. Privacy and association had been linked in some of the Court’s earliest cases on the freedom of association, but new connections emerged in the 1965 decision of *Griswold v. Connecticut*.³ *Griswold*’s framework eventually led to the right of intimate association recognized in *Roberts*.

The theoretical factor dominating the equality era was the rise of Rawlsian liberalism. Rawlsian questions about the relationship between liberty and equality, the limits of public reason, and the contours of individual autonomy dominated scholarly

³*Griswold v. Connecticut*, 381 U.S. 479 (1965).

discussions about associational freedom during the equality era. Rawlsian premises also permeated the legal academy during this time, and they are evident in *Roberts* and the scholarly commentary that followed the Court's decision.

Unlike the emergence of association in the national security era, the transformation of association in the equality era was already a few decades removed from the disappearance of the right of assembly in legal and political discourse. One of my objectives in retracing the transformation of association in the equality era is to highlight how these changes further deviated from the premises of assembly in ways detrimental to group autonomy. I have previously highlighted three such changes: (1) the rejection of dissenting and destabilizing groups in the interests of balance and consensus; (2) the depoliticization and privatization of some practices that once counted as part of public life; and (3) the supplanting of assemblies that were forms of expression by associations that were merely means of expression. As with the last chapter, my primary objective here is to highlight the historical plausibility of these changes. In the next chapter, I will explore the implications of these changes when I compare the right of assembly to the right of association.

A. CIVIL RIGHTS IN PUBLIC AND PRIVATE

The right of association that emerged in the national security era introduced crucial protections to the NAACP and its efforts to promote equality and civil rights for African Americans.⁴ During the equality era, freedom of association claims shifted from civil rights activists to segregationists who maintained a right to exclude. The same

⁴See Chapter 2.

associational principles that had previously been emphasized to protect the NAACP were now muted in the interests of furthering civil rights policy objectives.

1. Integration in Public Settings

Herbert Wechsler had infamously argued the year after *NAACP v. Alabama* that the right to exclude was implicated in *any* effort at integration.⁵ Wechsler had directed part of his critique against *Brown v. Board of Education*.⁶ His argument lacked plausibility in public settings like the schools at issue in *Brown*—it made little sense to argue that segregationists had a freedom to associate (or a right to exclude) in situations where the government provided a public good or service.⁷ Moreover, within a decade of *Brown*, integration in public settings fit comfortably within the “national democratic creed.” As *Brown* made clear, the America represented by the federal government and the northern states now demanded equal treatment for African Americans.⁸ That consensus supported forced integration in public education, public transportation, public

⁵Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” *Harvard Law Review* 73 (1959): 1. Wechsler argued that “the question posed by state-enforced segregation [was] not one of discrimination at all” but represented “the denial by the state of the freedom to associate.” *Ibid.*, 34. Conversely, “integration force[d] an association upon those for whom it [was] unpleasant or repugnant.” *Ibid.*

⁶*Brown v. Board of Education*, 347 U.S. 483 (1954).

⁷Cf. Andrew Koppelman, *Antidiscrimination Law and Social Equality* (New Haven: Yale University Press, 1996), 179 (“Wechsler’s objection to *Brown* is silly with respect to public schools. . .”).

⁸See Chapter 2 (discussing the views of the federal government and the northern media about *Brown*).

buildings, and public recreational facilities.⁹ It even extended to private entities doing business on public property.¹⁰ By 1961, integration policy applied “to virtually any private concern operating on public property,”¹¹ and three years later, segregation in “most forms of public life” had come to an end.¹² By the end of the 1960s, the consensus about integration in public life had grown even stronger.¹³

2. *Integration in Private Settings*

There was less consensus about integration in non-public settings. Once integration efforts shifted from public to private settings, Wechsler’s critique that “integration force[d] an association upon those for whom it [was] unpleasant or repugnant” gained traction.¹⁴ Writing in 1984, Justice O’Connor may have been justified in claiming that “[t]he Constitution does not guarantee a right to choose

⁹See, e.g., *Brown v. Board of Education*; *Boynton v. Virginia*, 364 U.S. 454 (1960) (interstate transportation); *Turner v. Memphis*, 369 U.S. 350 (1962) (airports); *Johnson v. Virginia* 373 U.S. 61 (1963) (courtrooms) (per curiam); *Brown v. Louisiana*, 383 U.S. 131 (1966) (libraries); *Watson v. Memphis*, 373 U. S. 526 (1963); *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971 (1954); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *New Orleans City Park Improvement Assn. v. Detiege*, 358 U. S. 54 (1958).

¹⁰*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (private restaurant owner who refused service based on customer’s race violated Fourteenth Amendment because restaurant was located in a building leased from a state entity).

¹¹Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1993), 65.

¹²*Ibid.*, 97.

¹³Cf. *ibid.* (“By the late 1960s and early 1970s there was not as large-scale or as deep-seated a social and cultural aversion to desegregation as there had been in the pre-1964 years.”).

¹⁴Wechsler, “Toward Neutral Principles,” 34.

employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State.”¹⁵ But at the dawn of the equality era, this interpretation was far from self-evident.

Widespread challenges to private sector segregation began with the sit-ins that started in Greensboro, North Carolina in 1960 and soon spread throughout the South. The Supreme Court reviewed sixty-one sit-in cases and sided with the demonstrators in almost all of them.¹⁶ But it stopped short of banning discrimination in non-public settings. As Gerald Rosenberg has suggested, changes in private businesses affected by these early sit-ins owed little to legal enforcement. Rather, “[e]conomic pressure, not constitutional mandate, appears the best explanation for the success of the sit-ins.”¹⁷

The legal landscape governing integration in private settings changed drastically with the Civil Rights Act of 1964.¹⁸ Title II of the Act extended to places of “public accommodation.”¹⁹ The sweeping legislation encompassed most for-profit businesses but exempted private clubs or other establishments “not in fact open to the public.”²⁰ By 1969, the Court had endorsed both the scope and authority of the Act, holding it

¹⁵*Roberts v. United States Jaycees*, 634 (O’Connor, J., concurring).

¹⁶Rosenberg, *The Hollow Hope*, 66 n.30.

¹⁷*Ibid.*, 142.

¹⁸Pub.L. 88-352, 78 Stat. 241, July 2, 1964.

¹⁹*Ibid.*

²⁰Section 201(b) and (e). Section 201(b) specifically named restaurants, cafeterias, lunchrooms, lunch counters, soda fountains, other facilities “principally engaged in selling food for consumption on the premises,” gasoline stations, motion picture houses, theaters, concert halls, sports areas, stadiums, and other places of “exhibition or entertainment.” See *Daniel v. Paul*, 395 U.S. 298, 302-03 (1969) (listing provisions).

applicable in *Daniel v. Paul* to an Arkansas amusement park with relatively thin ties to interstate commerce.²¹

In 1968, the Court handed another important resource to advocates of private sector integration with its decision in *Jones v. Alfred H. Mayer*.²² Justice Stewart relied on a Reconstruction era statute, the Civil Rights Act of 1866, which provided that “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”²³ Stewart concluded that the Act barred racial discrimination in the sale or lease of private property.²⁴ The following year, the Court extended the reach of *Jones* to membership in a community park and playground in *Sullivan v. Little Hunting Park*.²⁵ Douglas’s majority opinion concluded that an association could not be considered a private social club if its only selective element was race.²⁶ In 1973, the Court reached a similar result with respect to a private swimming pool in *Tilman v.*

²¹*Daniel v. Paul*, 298. The ties to interstate commerce (which were required for the federal law to reach the club) included the facts that some of the items sold in the club’s snack bar used ingredients produced and processed out of state, that the Club leased 15 paddle boats from an Oklahoma company, and that its juke box and records were manufactured out of state. *Ibid.*, 305, 308. The Court rejected the club’s claims that it was a private club exempt from the Act because it charged patrons a 25-cent “membership” fee and distributed “membership” cards. *Ibid.*, 301-302.

²²*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

²³ The act is codified at 42 U.S.C. § 1982. The fair housing provisions of the Civil Rights Act of 1968 had taken effect while *Jones* was before the Court and were not applicable to the case.

²⁴*Jones v. Alfred Mayer*, 444.

²⁵*Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

²⁶*Ibid.*

*Wheaton-Haven Recreation Assn.*²⁷ Because race constituted the pool’s only selective membership requirement, the Court found “no plan or purpose of exclusiveness” and concluded that the pool’s structure and practices were “indistinguishable” from those of the association in *Sullivan*.²⁸

3. *The Limits of State Action*

The reach of antidiscrimination law into private action met its limits in *Moose Lodge No. 107 v. Iris*.²⁹ The case began when the operators of Moose Lodge No. 107 refused to serve an African-American named K. Leroy Iris.³⁰ Iris, who also happened to be a member of the State House of Representatives, filed a complaint with the Pennsylvania Human Relations Board. He asserted that Moose Lodge’s refusal to serve to him constituted state action because the Pennsylvania liquor board had licensed the facility to sell alcoholic beverages.³¹

Moose Lodge indicated that it would likely surrender its license in order to maintain its racist practices if the Court ruled against it.³² But the Lodge contended that

²⁷*Tilman v. Wheaton-Haven Recreation Assn., Inc.*, 410 U.S. 431 (1973).

²⁸*Ibid.*, 438.

²⁹*Moose Lodge No. 107 v. Iris*, 407 U.S. 163 (1972).

³⁰Iris was a guest of a member of the Lodge. The local lodge was bound by the constitution and bylaws of the Supreme Lodge, which restricted membership and member guests to whites. *Ibid.*, 165-66.

³¹*Ibid.*, 165.

³²See Reply Brief of Appellant Moose Lodge No. 107 at 3-4, 5 (“[t]he immediate consequence of [the loss of the liquor license], one could reasonably suppose, would be that members bent on conviviality would operate a locker system. Thus they would use their own bottles, no sales of liquor would take place, and the Moose Lodge would

the loss of the license would nonetheless be detrimental because “profits from the bar make possible virtually every private club’s continued existence.”³³ Irvis replied that while the members of Moose Lodge were “free to associate with whom they please,” they had no “concomitant right to receive a club liquor license.”³⁴ And in response to the Lodge’s claim that the loss of the license would threaten its existence, Irvis expressed doubt over “just how significant and valuable a privilege the right to associate is” if Moose Lodge were to fold “absent the privilege granted by the holding of a club liquor license.”³⁵

Irvis’s argument has superficial appeal but is problematic for two reasons. First, it ignores the possibility that the selling of alcohol to keep the club financially solvent might be instrumental to the attainment of other goods derived from association. To take an obvious example, the members of Moose Lodge likely attained some psychological benefit by gathering in a segregated setting. That might not be a morally commendable good, but it is a good nonetheless distinct from the financial benefits of the sale of alcohol. A second problem with Irvis’s logic is that it implicitly implicates the panoply of other government licensing schemes applicable to private clubs. State and local governments administer not only liquor licenses but also regulate everything from food

supply only set-ups and mixers. . . . [M]atters remain as before—with the single exception that Moose Lodge members cannot buy drinks at a bar but must bring their own bottles to the club lockers”) (quoted in Anthony G. Aiuvalasit, Jr., “Moose Lodge v. Irvis: The Undecided Decision,” *New England Law Review* 8 (1973): 269).

³³Ibid., 56 (quoted in Aiuvalasit, “Moose Lodge,” 270).

³⁴App. Brief at 46 (quoted in Aiuvalasit, “Moose Lodge,” 269).

³⁵Ibid. Cf. *ibid.* at 270 (“if Moose Lodge were to close due to the lack of a liquor license the only associational right lost to its members would be the ability to gather together for the purpose of drinking discount liquor”).

service to fire code compliance. If every issuance of a government license constituted state action, then a club seeking to avoid the imprimatur of government sponsorship would be extremely limited in its activities.

The Court rejected Irvis's argument that constitutional concerns attached any time that a private entity "receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever."³⁶ That would "utterly emasculate the distinction between private as distinguished from State conduct."³⁷ Moose Lodge was "a private club in a private building."³⁸

Douglas dissented, arguing that "special circumstances" pertaining to Pennsylvania's "complete and pervasive" licensing scheme rose to the level of "an invidious form of state action."³⁹ But while disagreeing with the majority's holding, Douglas offered strong words about the associational protections that he would ostensibly extend to private groups absent state action, asserting that the First Amendment created "a zone of privacy which precludes government from interfering with private clubs or

³⁶*Moose Lodge*, 173.

³⁷*Ibid.*

³⁸*Ibid.*, 175. Cf. *ibid.*, 171 ("Moose Lodge is a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only by invitation of a member or upon invitation of the house committee.").

³⁹ *Ibid.*, 180, 181, 182 (Douglas, J., dissenting). Douglas found additional problems with Pennsylvania's "complex quota system" of issuing licenses. *Ibid.*, 182.

groups.”⁴⁰ In language that would be hard to reconcile with most of the Court’s civil rights cases, Douglas elaborated that:

The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.⁴¹

4. Private School Segregation

In concluding that Pennsylvania’s liquor license did not constitute sufficient state action to force integration on Moose Lodge, the Court had implied that private clubs remained free to discriminate on the basis of race. By this time, the Court had also made clear that the Civil Rights Act of 1866 and the Civil Rights Act of 1964 together reached most entities that could not be characterized as private clubs. And, as *Sullivan* and *Tilman* had made clear, clubs whose only selective membership requirement was race did not count as private. One question unaddressed amidst these developments concerned the associational rights of students attending segregated private schools, whose numbers had grown exponentially in the South since *Brown*.⁴²

Preliminary challenges to private school segregation focused on government financial support. In the late 1960s, the Court affirmed a number of lower court decisions

⁴⁰*Ibid.*, 179.

⁴¹*Ibid.*, 179-80.

⁴²Rosenberg reports that the number of all-white private schools in Louisiana went from sixteen before *Brown* to fifty-three after *Brown*. Rosenberg, *The Hollow Hope*, 83. In Mississippi, seventeen private schools other than Catholic schools enrolled 2,362 students (916 of whom were black) during the 1963-1964 school year. By 1970, the number of schools had increased to 155 with an enrollment of around 42,000 students, nearly all of whom were white. *Norwood v. Harrison*, 413 U.S. 455, 457 (1973).

enjoining state tuition grants to students attending racially discriminatory private schools.⁴³ In 1973, it addressed in *Norwood v. Harrison* the propriety of state-funded textbook loans to students attending these schools.⁴⁴ The Court concluded that the textbook loans were “not legally distinguishable” from tuition grants.⁴⁵ *Norwood* also provided the Court’s first attempt to address directly the conflict between antidiscrimination efforts and the right of association. Summarizing recent legislative and judicial developments, Chief Justice Burger reasoned that:

Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances.⁴⁶

Burger also noted that because “the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.”⁴⁷

As with its approach to private clubs in *Moose Lodge*, the Court did not leave unbounded the extent to which state action could be imputed to private schools. In *Gilmore v. City of Montgomery*, the justices addressed the use of public recreational

⁴³See, e.g., *Brown v. South Carolina Board of Education*, 296 F.Supp. 199 (D.C.S.C. 1968), aff’d per curiam, 393 U. S. 222 (1968); *Poindexter v. Louisiana Financial Assistance Comm’n*, 275 F.Supp. 833 (ED La. 1967), aff’d per curiam, 389 U. S. 571 (1968).

⁴⁴*Norwood v. Harrison*.

⁴⁵*Ibid.*, 463.

⁴⁶*Ibid.*, 470. The Court was referring to Section 2 of the Thirteenth Amendment and also noted that “Congress has made such discrimination unlawful in other significant contexts.” *Ibid.*

⁴⁷*Ibid.*, 463.

facilities by private segregated school groups.⁴⁸ Justice Blackmun’s majority opinion noted that in contrast to the relatively easy question about integrating public facilities and programs, “[t]he problem of private group use is much more complex.”⁴⁹ The dispositive question was whether the use of public facilities made the government “a joint participant in the challenged activities.”⁵⁰ The Court concluded that municipal recreational facilities including parks, playgrounds, athletic facilities, amphitheaters, museums, and zoos were sufficiently akin to “generalized governmental services” like traditional state monopolies such as electricity, water, and police and fire protection.⁵¹ Accordingly, the use of these facilities by private groups that discriminated on the basis of race did not rise to the level of government endorsement of discriminatory practices.⁵² But Blackmun went even further: the exclusion of a discriminatory group from public facilities would violate the group’s freedom of association.⁵³ In strong language that didn’t appear elsewhere in the Court’s civil rights cases, Blackmun noted that “the freedom to associate applies to the beliefs we share, and to those we consider reprehensible” and “tends to produce the diversity of opinion that oils the machinery of democratic government and insures

⁴⁸*Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). The decision came after repeated instances of Montgomery’s blatant disregard of mandates to integrate its public facilities.

⁴⁹*Ibid.*, 572.

⁵⁰*Ibid.*, 573 (quoting).

⁵¹*Ibid.*, 574.

⁵²Blackmun observed that the result might be different if “the city or other governmental entity rations otherwise freely accessible recreational facilities” in a manner suggestive of discriminatory intent. *Ibid.*, 574.

⁵³*Ibid.*, 575. Blackmun quoted from Douglas’s *Moose Lodge* dissent.

peaceful orderly change.”⁵⁴ At the same time, he cautioned that “the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action.”⁵⁵

Blackmun’s recognition of the freedom of association for racially discriminatory private schools didn’t last long. Two years after *Gilmore*, in *Runyon v. McCrary*, the Court construed another provision of the Civil Rights Act of 1866 to preclude racial discrimination by “private, commercially operated, nonsectarian schools.”⁵⁶ Rejecting the suggestion that the legislation “[did] not reach private acts of racial discrimination,”⁵⁷ Justice Stewart wrote that:

From [the principle of the freedom of association] it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the *belief* that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.⁵⁸

Stewart buttressed his position in *Runyon* with a carefully edited quotation from *Norwood*. Burger had written in *Norwood* that “. . . *although the Constitution does not proscribe private bias*, it places no value on discrimination.”⁵⁹ Stewart’s quotation omitted Burger’s prefatory clause and asserted: “As the Court stated in [*Norwood*], ‘the

⁵⁴Ibid.

⁵⁵Ibid.

⁵⁶*Runyon v. McCrary*, 427 U.S. 160, 168 (1976).

⁵⁷Ibid., 173.

⁵⁸Ibid., 176 (emphasis added).

⁵⁹*Norwood v. Harrison*, 469-70 (emphasis added).

Constitution . . . places no value on discrimination.”⁶⁰ The abbreviated language stood for a broader legal principle than *Norwood* had conveyed. In *Norwood*, the Court had, in effect, prevented government subsidization of a disfavored social practice. *Runyon* precluded the practice itself.

Stewart’s distinction between advocacy (expressing the belief that racial segregation is desirable) and practice (excluding racial minorities from private schools) may have produced a socially desirable result, but it undeniably constrained the freedom of association. On Stewart’s reasoning, one could associate to express an odious belief but not to engage in an odious practice, even if that practice posed no imminent danger. Stewart reiterated this narrow understanding of the right of association in cases beyond the confines of civil rights. Writing for the majority in *Abood v. Detroit Board of Education*, a 1977 case involving an “agency shop” arrangement for state government employees, he described “the freedom of an individual to associate *for the purpose of advancing beliefs and ideas*.”⁶¹ And four years later, writing for the Court in *Democratic Party of the United States v. Wisconsin*, a case involving political parties, Stewart referred to the “freedom to gather in association *for the purpose of advancing shared beliefs*.”⁶² That same year, Burger echoed Stewart’s view in *Citizens Against Rent Control v. Berkeley*.⁶³ Although acknowledging that “the practice of persons sharing common views banding together *to achieve a common end* is deeply embedded in the

⁶⁰*Runyon v. McCrary*, 176.

⁶¹*Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977) (emphasis added).

⁶²*Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 121 (1981) (emphasis added).

⁶³*Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (emphasis added).

American political process,” Burger asserted that the real value of association is “that by collective effort individuals can *make their views known*, when, individually, their voices would be faint or lost.”⁶⁴ This kind of reasoning endorsed an instrumental conception of association that would be made explicit in *Roberts*.

5. *The Cost of Achieving Policy Objectives*

The decade lasting from the mid-1960s to the mid-1970s marked significant strides toward equality for African Americans with the coalescence of efforts by the three branches of the federal government to rid the country of segregationist practices.⁶⁵ By the end of that period, integration was indisputably part of the national democratic creed. Most Americans outside the South even accepted the Court’s conclusion that the “badges and incidents of slavery”⁶⁶ justified some incursions into private discrimination. Of course, these efforts met with only limited success when more subtle forms of racism and discriminatory practices migrated into increasingly private and undetectable realms.

Given the breadth and depth of racism then and now, the reach of antidiscrimination law to private settings during the first part of the equality era is not hard to defend, and I have no desire to challenge it. But what cannot be lost in the moral endorsement of the policy objectives and outcomes of the civil rights litigation is the cost of those efforts to the freedom of association. While few today would object to the substantive outcomes of compelled integration in private settings, they came at the

⁶⁴Ibid., 294 (emphasis added).

⁶⁵Gerald Rosenberg’s important study emphasizes that these changes did not come about from the Court alone. See Rosenberg, *The Hollow Hope*, 39-169.

⁶⁶*Jones v. Alfred Mayer*, 439.

expense of a right of association that could stand against majoritarian impulses and consensus beliefs.

B. ASSOCIATION AND PRIVACY

The clash between integration and the right to exclude developed in parallel to a line of cases that emphasized a wholly different aspect of associational freedom: privacy. Frankfurter and Douglas had linked association and privacy in cases during the national security era.⁶⁷ And Harlan had referred to the “the vital relationship between freedom to associate and privacy in one’s associations” in *NAACP v. Alabama*.⁶⁸ But the connection deepened after the Court recognized a constitutional right to privacy in *Griswold v. Connecticut*.⁶⁹ Because privacy, like association, appeared nowhere in the text of the Constitution, the Court’s earlier recognition of the right of association in *NAACP v. Alabama* became an important example of the kind “penumbral” reasoning that justified the right of privacy in *Griswold*.

There was, however, a definitional problem with the meaning of privacy in the context of association. Brandeis and Warren’s classic definition of the right “to be let

⁶⁷See *Sweezy v. New Hampshire*, 354 U.S. 234, 266-67 (1957) (Frankfurter, J., concurring); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 560 (1963) (Douglas, J., concurring).

⁶⁸*NAACP v. Alabama*, 462. Harlan continued that: “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *Ibid*.

⁶⁹*Griswold v. Connecticut*, 381 U.S. 479 (1965).

alone” conveyed a sense of individual autonomy.⁷⁰ But references to privacy in the association cases during the national security era had more to do with protecting the boundaries of group autonomy than endorsing individual autonomy. That kind of privacy didn’t mean “not public”; groups like the NAACP and the Communist Party had in fact clamored for public visibility and recognition. Before *Griswold*, privacy in the context of association existed largely to facilitate public and political actions rather than to protect secret or intimate actions.

1. Recognizing a Right to Privacy: Griswold v. Connecticut

Griswold struck down a Connecticut law that prohibited the use of contraceptives and the giving of medical advice about their use, and specifically, the application of this law to the use of contraceptives by married persons. Warren assigned the opinion to Douglas. In a draft that he shared only with Brennan, Douglas made scant reference to a right of privacy and rested his argument almost entirely on the First Amendment freedom of association.⁷¹ Douglas argued that while marriage did “not fit precisely any of the categories of First Amendment rights,” it was “a form of association as vital in the life of

⁷⁰Louis Brandeis and Sam Warren, “The Right to Privacy,” *Harvard Law Review* 4 (1890): 193, 195. This kind of individualism would eventually undergird the modern right to privacy.

⁷¹Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (New York: Oxford University Press, 1985), 237. Douglas’s only mention of privacy in the draft came in the concluding paragraph, where he linked privacy to association, as he had done in his *Gibson* concurrence: “The prospects of police with warrants searching the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives is repulsive to the idea of privacy and association that make up a goodly part of the penumbra of the Constitution and Bill of Rights.” *Ibid.*, 236 (quoting Douglas’s draft opinion). Schwartz writes that Douglas’s sole mention of privacy in the last sentence of his draft “is scarcely enough to make it the foundation for any constitutional right of privacy, particularly for the broadside right established by the final *Griswold* opinion.” *Ibid.*, 230.

a man or woman as any other, and perhaps more so.”⁷² He reasoned that “[w]e would, indeed, have difficulty protecting the intimacies of one’s relations to [the] NAACP and not the intimacies of one’s marriage relation.”⁷³

After reviewing the draft, Brennan urged Douglas to abandon his exclusive reliance on the right of association.⁷⁴ Brennan argued that marriage did not fall within the kind of association that the Court had recognized for purposes of political advocacy.⁷⁵ (Black had quipped during the justices’ conference on the case that “[t]he right of a husband and wife to assemble in bed is a new right of assembly to me.”)⁷⁶ Brennan suggested that Douglas instead analogize the Court’s recognition of the right of association to a similar broadening of privacy into a constitutional right. Neither privacy nor association could be found in the text of the Constitution. If association could be recognized as a freestanding constitutional right, then so could privacy. Douglas followed Brennan’s suggestions and wrote that the “specific guarantees in the Bill of

⁷²Ibid., 235 (quoting Douglas’s draft opinion). Despite his reliance on the First Amendment throughout his argument, Douglas concluded his draft with broader references to privacy and the Constitution: “The prospects of police with warrants searching the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives is repulsive to the idea of privacy and of association that make up a goodly part of the penumbra of the Constitution and Bill of Rights.” Ibid., 236.

⁷³Ibid., 235.

⁷⁴Ibid., 237. Brennan argued that Douglas’s expanded view of association would extend First Amendment protection to the Communist Party. Ibid., 237-38.

⁷⁵Ibid., 237.

⁷⁶Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America* (New York: Times Books, 2007), 129.

Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁷⁷

In addition to its recognition of privacy, Douglas’s final opinion also contained some extended (and not altogether coherent) language about the constitutional source of the freedom of association. In locating one of the penumbras of privacy in the First Amendment, Douglas wrote:

In *NAACP v. Alabama*, we protected the “freedom to associate and privacy in one’s associations,” noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid “as entailing the likelihood of a substantial restraint upon the exercise by [the NAACP’s] members of their right to freedom of association.” In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of “association” that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members [citing *NAACP v. Button*].⁷⁸

In a dissenting opinion issued just a month prior to *Griswold*, Douglas had referred to a singular “right of assembly and association.”⁷⁹ But now he argued that *NAACP v. Alabama* and *Button* “involved more than the ‘right of assembly.’”⁸⁰ Instead:

The right of “association,” like the right of belief, is more than the right to attend a meeting; it includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its

⁷⁷*Griswold v. Connecticut*, 484.

⁷⁸*Ibid.*, 483.

⁷⁹*Zemel v. Rusk*, 381 U.S. 1, 24 (1965) (Douglas J., dissenting) (quoting the Papal encyclical *Pacem in Terris*).

⁸⁰*Griswold v. Connecticut*, 483.

existence is necessary in making the express guarantees fully meaningful.⁸¹

Douglas's thin conception of the right of assembly as no more than "the right to attend a meeting" departed from his past descriptions of that right. Having thus confined assembly, Douglas suggested that the right of association was "necessary in making the express guarantees [of the First Amendment] fully meaningful." But there was no inherent reason that assembly required a separate right of association. The Court had long ago set forth the broad contours of the rights of speech and assembly in *Thomas v. Collins*:

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction.⁸²

Douglas, in fact, had quoted the above language in his 1961 dissent in *Communist Party v. Subversive Activities Control Board*, adding that "[t]he vices of registration [of an organization] may be not unlike those of licensing."⁸³ Yet despite his repeated arguments against this kind of prior restraint in the area of free speech, he failed to make the same connection to assembly.⁸⁴

⁸¹Ibid., 483 (citation omitted).

⁸²*Thomas v. Collins*, 323 U.S. 516, 540 (1945)

⁸³*Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 170 (1961) (Douglas, J., dissenting).

⁸⁴See *Poulos v. New Hampshire*, 345 U.S. 395, 423 (1953) (Douglas, J., dissenting) ("There is no free speech in the sense of the Constitution when permission must be obtained from an official before a speech can be made. That is a previous restraint condemned by history and at war with the First Amendment."); *Kingsley International*

Douglas nevertheless maintained an important understanding of association in *Griswold* that would be lost a decade later in Stewart's instrumental characterization in *Runyon*. Douglas argued that the right of association "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means."⁸⁵ In other words, as he had argued in a dissent four years earlier, "[j]oining is one method of expression."⁸⁶ For Douglas, the act of association was itself an intrinsically valuable form of expression. For Stewart, it became merely an instrumental means of facilitating expression.

Douglas's reasoning in *Griswold* failed to convince all of his colleagues. Harlan "fully agree[d] with the judgment of reversal" but rejected the incorporation argument that he saw as implicit in Douglas's insistence that "the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights."⁸⁷ Harlan based his objection on the now familiar liberty argument: "the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic

Pictures Corp. v. New York, 360 U.S. 684, 697-98 (1959) (Douglas J., dissenting) ("I can find in the First Amendment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie."); *New York Times v. United States*, 403 U.S. 713, 720-25 (1971) (Douglas, J., concurring).

⁸⁵*Griswold v. Connecticut*, 483.

⁸⁶*Lathrop v. Donohue*, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting).

⁸⁷*Griswold v. Connecticut*, 499 (Harlan, J., concurring).

values ‘implicit in the concept of ordered liberty.’”⁸⁸ Black also disagreed with

Douglas’s penumbral argument. His dissent lamented that:

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term “right of privacy” as a comprehensive substitute for the Fourth Amendment’s guarantee against “unreasonable searches and seizures.” “Privacy” is a broad, abstract and ambiguous concept which can easily be shrunk in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used.⁸⁹

Black’s words couldn’t have been more ironic in light of his repeated endorsement of the right of association, which had certainly been a failure “to stick to the simple language of the First Amendment in construing it.” Moreover, as the Court’s association cases in the national security era had shown, substituting a new right of association for the right of assembly had been “one of the most effective ways of diluting or expanding” the constitutional protections for communists and civil rights activists.

2. *Reinterpreting Privacy: Eisenstadt v. Baird*

In 1972, the Court extended *Griswold*’s holding to unmarried persons desiring access to contraception.⁹⁰ Brennan’s majority opinion in *Eisenstadt v. Baird* relied

⁸⁸*Ibid.*, 500.

⁸⁹*Ibid.*, 509 (Black, J., dissenting).

⁹⁰*Eisenstadt v. Baird*, 405 U.S. 438 (1972).

heavily on *Griswold* but not on Douglas's reasoning. In *Griswold*, Douglas had maintained that part of the right to privacy rested on the "association" of marriage:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁹¹

In *Eisenstadt*, Brennan shifted the focus away from Douglas's emphasis on the marital relationship:

It is true that, in *Griswold*, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁹²

Brennan's language thus converted a concept rooted in association between people to a right of individual autonomy. As H. Jefferson Powell writes, "Brennan's reading of *Griswold* turned Douglas's reasoning on its head" and signaled "the identification of a radically individualistic liberalism as the moral content of American constitutionalism."⁹³ Ironically, Brennan's reasoning drew upon the liberty argument that Harlan had advanced

⁹¹*Griswold v. Connecticut*, 486.

⁹²*Eisenstadt v. Baird*, 453. Douglas concurred in the result, but wrote that "[t]his to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth." *Ibid.*, 455 (Douglas, J., concurring).

⁹³H. Jefferson Powell, *The Moral Tradition of American Constitutionalism* (Durham: Duke University Press, 1993), 176, 177.

in *NAACP v. Alabama* and other cases (including his *Griswold* concurrence).⁹⁴ The right of privacy utterly detached from the right of association had no First Amendment basis; it came rather from the “liberty” of the Due Process Clause of the Fourteenth Amendment—exactly where Harlan had argued against Brennan that the right of association was itself located.⁹⁵

C. THE RISE OF RAWLSIAN LIBERALISM

As the Court and commentators proceeded with separate analyses of association in civil rights and privacy decisions, John Rawls introduced to political and legal discourse a theoretical resource with significant implications for the right of association. The appearance of Rawls’s *A Theory of Justice* in 1971 breathed new life into the discipline of political theory, which had increasingly been exiled from political science by the behavioralism of postwar pluralists.⁹⁶ But while Rawls came to be viewed as a kind of normative antidote to the ostensibly descriptive pluralist claims that pervaded political science in the 1950s and 1960s, his basic framework echoed many pluralist assumptions. As John Gunnell has written, that “[t]he new pluralism is, in many respects,

⁹⁴The flexible approach to liberty that Frankfurter and Harlan had championed against the incorporation theories of Black and Douglas was actually a far greater resource for “judicial activism” in which the Court supplanted legislative policy judgments with its own. Frankfurter and Harlan’s adherence to judicial restraint kept them from using “liberty” to this end, but they provided the analytical roadmap for other justices less inclined to show restraint.

⁹⁵Powell writes that *Eisenstadt* “clearly marked the reemergence of substantive due process as a mode of constitutional argument that the Court considered legitimate.” Powell, *Moral Tradition*, 176.

⁹⁶John Rawls, *A Theory of Justice* (Cambridge: Belknap Press (revised edition), 1999 (1971)). As Dahl and other pluralists insisted on empiricism and inductive research, the normative claims of political theorists became less central to the discipline.

not the same as the old pluralism . . . but it is, at bottom, the same theory.”⁹⁷ The continuity is particularly evident with respect to questions about group autonomy. Pluralist political thought insisted on a consensus bounded by the democratic creed; Rawlsian liberalism presumed an “overlapping consensus” in which egalitarianism rooted in an individualist ontology trumped and thus bounded diversity. Pluralists attributed harmony and balance to group interaction to explain the relative stability that they perceived; Rawls feared a loss of stability and made the preservation of peaceful interactions a cornerstone of his normative theory. Like the pluralist assumptions that preceded them, the Rawlsian premises of consensus and stability pervaded political discourse and influenced the ways in which the equality era reshaped the right of association.

1. The Rawlsian Framework

Rawls has inspired an enormous secondary literature, and it is not my intention here to summarize the many applications and critiques of his theory of justice. Rather, I am only interested in covering the background necessary to interrogate his views about the freedom of association. Because Rawls’s theory developed throughout the equality era, and because more refined articulations appear in his later works, I draw upon some of these later sources and assume they are in continuity with his original theory unless otherwise indicated.

Rawls’s theory was self-avowedly motivated out of a concern for political stability that could avoid the kind of sectarian religious violence that followed the

⁹⁷John Gunnell, “The Real Revolution in Political Science,” *PS: Political Science* 37 (2004), 49.

European Reformation in the sixteenth and seventeenth centuries.⁹⁸ He believed this stability could be attained through the “well-ordered society,” that is, “a society effectively regulated by a public political conception of justice.”⁹⁹ In this society, “everyone accepts, and knows that everyone else accepts, the very same principles of justice.”¹⁰⁰ This agreement could be reached without “the oppressive use of state power.”¹⁰¹ Rawls initially asserted that citizens, in spite of their differences, could pursue a common understanding of justice from an “Archimedean point . . . by assuming certain general desires, such as the desire for primary social goods, and by taking as a basis the agreements that would be made in a suitably defined initial situation.”¹⁰² He later came to believe that liberal society could never overcome the interminable disagreement that flowed from what he called “conflicting and incommensurable doctrines.”¹⁰³ But he insisted that we might nonetheless attain political stability that was more than a mere *modus vivendi*.¹⁰⁴ Rawls believed that while “reasonable pluralism” permitted “a diversity of reasonable comprehensive doctrines,” we could discover an “overlapping consensus” about justice from among these comprehensive doctrines by constraining

⁹⁸John Rawls, *Political Liberalism* (New York: Columbia University Press, 1995), xvii, 148.

⁹⁹*Ibid.*, 35.

¹⁰⁰*Ibid.* Cf. *ibid.*, 140-44. Rawls notes this is “a highly idealized concept.” *Ibid.*, 35.

¹⁰¹*Ibid.*, 35. Rawls rejects the notion of “a continuing shared understanding” based on “one comprehensive religious, philosophical, or moral doctrine.”

¹⁰²Rawls, *A Theory of Justice*, 232.

¹⁰³Rawls, *Political Liberalism*, 135.

¹⁰⁴*Ibid.*, 148.

dialogue to “public reason.”¹⁰⁵ He thought that the overlapping consensus of reasonable belief would produce agreement over the “basic structure” and the “primary social goods” of society, which include rights, liberties, opportunities, income and wealth, and self-respect.¹⁰⁶

Rawls’s “basic liberties” loosely track constitutional rights, and they include the freedom of association.¹⁰⁷ The freedom of association is related to what Rawls calls

¹⁰⁵Ibid., 36.

¹⁰⁶Rawls, *A Theory of Justice*, 6, 79, 386.

¹⁰⁷Rawls omits the freedom of association from his list of these liberties in *A Theory of Justice* but includes it in *Political Liberalism*. Compare Rawls, *A Theory of Justice*, 53 (listing “freedom of speech and assembly” but not association) with Rawls, *Political Liberalism*, 291, 335. Kevin Kordana and David Tabachnick have suggested that “the Rawlsian texts appear not to be consistent with regard to the status of the right to freedom of association” and “[t]he status of a right to freedom of association” among the basic liberties is “neither obvious nor uncontroversial.” Kevin A. Kordana and David Blankfein Tabachnick, “The Rawlsian View of Private Ordering,” *Social Philosophy and Policy* 25 (2008): 288, 290. I am not convinced by this interpretation; Rawls certainly seems to describe something akin to freedom of association in his account of the basic liberties in *A Theory of Justice* even if he does not name it as such. See Rawls, *A Theory of Justice*, 195-96 (“There are firm constitutional protections for certain liberties, particularly freedom of speech and assembly, and liberty to form political associations. The principle of loyal opposition is recognized, the clash of political beliefs, and of the interests and attitudes that are likely to influence them, are accepted as a normal condition of human life. . . . Without the conception of loyal opposition, and an attachment to constitutional rules which express and protect it, the politics of democracy cannot be properly conducted or long endure.”); cf. John Rawls, “Constitutional Liberty and the Concept of Justice,” in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, 1999), 94 (writing in 1962 that “although tolerant sects have a right not to tolerate an intolerant sect when they sincerely and with reason believe that their own security and that of the institution of liberty is in danger, they have this right only in this case”). And as early as 1975, Rawls noted that a well-ordered society “ensures an equal liberty and freedom of association.” John Rawls, “Fairness to Goodness” in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, 1999), 275. But this quibble is tangential to my consideration of Rawls’s understanding of association because Kordana and Tabachnick agree that at least some component of the right of association is included among the basic liberties. Kordana and Tabachnick, “The Rawlsian View of Private Ordering,” 290 (freedom of association is a “complex right”).

“private society,” which “is not held together by a public conviction that its basic arrangements are just and good in themselves.”¹⁰⁸ As a result, “there are many types of social union and from the perspective of political justice we are not to try to rank them in value.”¹⁰⁹ In fact, “[a] well-ordered society, and indeed most societies, will presumably contain countless social unions of many different kinds.”¹¹⁰ Importantly, “government has no authority to render associations either legitimate or illegitimate any more than it has this authority in regard to art or science.”¹¹¹

Yet at the same time, Rawls’s vision for stability depends on consensus, and consensus can only be reached by constraining certain modes of discourse through public reason. Rawls maintains that public consensus is possible because political views can be detached from comprehensive doctrines: “we always assume that citizens have two views, a comprehensive and a political view; and that their overall view can be divided into two parts, suitably related.”¹¹² He offers his most refined version of the public reason constraint in a 1997 essay titled “The Idea of Public Reason Revisited.”¹¹³ There

¹⁰⁸Rawls, *Theory of Justice*, 457, 458.

¹⁰⁹*Ibid.*, 462.

¹¹⁰*Ibid.*

¹¹¹*Ibid.*, 186.

¹¹²*Ibid.*, 140. To this end, Rawls advocated that a “political conception” of justice could be attained “without reference” to comprehensive doctrines. *Ibid.*, 12. For Rawls, comprehensive doctrines “belong to what we may call the ‘background culture’ of civil society” which “is the culture of the social, not of the political.” *Ibid.*, 14. Rawls’s distinction between the “social” and the “political” is particularly troubling, as if “the culture of daily life, of its many associations” could exist in a social realm uninhibited by the legal framework established by the political. *Ibid.*

¹¹³John Rawls, “The Idea of Public Reason Revisited,” *Chicago Law Review* 64 (1997).

he writes that the requirement of public reason “still allows us to introduce into political discussion at any time our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.”¹¹⁴

2. *Rawls and Association*

Rawls’s commitment to stability and consensus in the basic structure of society on the one hand, and his recognition of the freedom of association in private society on the other, leads to an ambiguity about the boundaries of associational autonomy. Feminist theorists have famously called attention to this ambiguity with respect to the family.¹¹⁵ It also exists with other kinds of groups. As Nancy Rosenblum observes, “[o]ne possibility is that associational life is part of the ‘basic structure’ of a well-ordered society, whose organization and norms must conform to principles of justice because their efforts on defining men’s rights and duties and influence their life-prospects ‘are so profound and present from the start.’”¹¹⁶ But “[e]xcept for serfdom and slavery Rawls does not identify arrangements that must be prohibited as a condition for the morality of association.”¹¹⁷ Accordingly, Rosenblum argues that “[w]e can conclude that associations do not fail in serving their formative moral purposes by being incongruent with the public norms of

¹¹⁴Ibid., 776 (emphasis added). This “proviso” echoes his view in *Political Liberalism* that citizens can invoke comprehensive doctrines “provided they do this in ways that strengthen the idea of public reason itself.” Rawls, *Political Liberalism*, 247.

¹¹⁵See, e.g., Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic, 1989).

¹¹⁶Rosenblum, *Membership and Morals*, 54.

¹¹⁷Ibid.

liberal democracy, or by being insufficiently complex and comprehensive to move members in the direction of appreciation for principles of justice.”¹¹⁸ Rather, “the morality of association provides a pluralist background culture, much of it incongruent with liberal democracy.”¹¹⁹

On my reading, Rawls’s ambiguity ultimately leads to an unacceptable incursion into group autonomy. The problem becomes evident when a claim to one of the primary goods (e.g., self-respect) clashes with a claim to freedom of association and must be adjudicated by a court. Because Rawls requires public reason from “the discourse of judges in their decisions, and especially of the judges of a supreme court,” there is every indication that the dispute will have to be resolved on the basis of public reason.¹²⁰ But what if the practices underlying a claim to freedom of association cannot be reduced to public reason?

Suppose, for example, that a private association of men wants to exclude women and that the exclusion damages the self-respect of those women. The conflict requires an outcome that prioritizes one basic good over another. Rawls may at first glance seem agnostic about the resolution. But suppose the reasons that the men have for desiring exclusivity derive from beliefs and values internal to their tradition and practices that neither accord with nor subscribe to Rawlsian public reason. We might consider several such possibilities: an emotive explanation (e.g., “we feel better when we gather exclusively as men”), an expressive explanation (e.g., “we believe that our gathering of

¹¹⁸Ibid.

¹¹⁹Ibid.

¹²⁰Rawls, “The Idea of Public Reason Revisited,” 767.

men best expresses to the world our fundamental beliefs”), or a theological explanation (e.g., “we gather exclusively as men based on our understanding of God’s command to us”). By imposing the constraint of public reason, Rawls precludes the judge or judges resolving the dispute from relying on these arguments.

The only remaining arguments that satisfy public reason are seemingly tautological claims about the importance of free association (or a derivative claim of the importance of emotion, expression, or religion) for its own sake, and these will surely fail against the countervailing claim of damaged self-respect, which is “perhaps the most important primary good.”¹²¹ But the analysis leading to this conclusion proceeds within a constrained discourse. There is nothing inherent in a procedural scheme of justice that requires either public reason or the outcome it generates. And despite Rawls’s aspiration to reach agreement through discussion, decisions based upon public reason will ultimately be enforced by the coercive and violent imposition of the law.¹²²

It is important to recognize the logical consequences of Rawls’s public reason constraint even when they aren’t immediately triggered. For example, a group unable to articulate a public reason defense of its practices may nevertheless flourish under a Rawlsian scheme as long as it is unchallenged. But that group’s freedom is contingent on

¹²¹Rawls, *Theory of Justice*, 386. As Corey Brettschneider argues, “the test for the reasonableness of comprehensive doctrines is substantive and not merely formal,” and “nonjustifiable principles expressed in the language of public reason are still nonjustifiable.” Corey Brettschneider, “The Politics of the Personal: A Liberal Approach,” *American Political Science Review* 101 (2007): 22.

¹²²See generally Robert Cover, “Violence and the Word,” *Yale Law Journal* 95 (1986): 1601. Cover begins his article with the chilling pronouncement that “[l]egal interpretation takes place in a field of pain and death.” Ibid. He later notes that “[t]he violence of judges and officials of a posited constitutional order is generally understood to be implicit in the practice of law and government. Violence is so intrinsic to this activity, so taken for granted, that it need not be mentioned.” Ibid.

the absence of a challenge based on public reason. When a group encounters a constraint justified in terms acceptable to public reason, it must either modify its practices or cease to exist unless it can offer a defense grounded in public reason.¹²³

3. *Rawls and Legal Theory*

Rawls may not have been cited in the legal decisions that reshaped the freedom of association in the first part of the equality era, but his influence was close at hand. His framework was soon adopted by legal academics eager to provide intellectual cover to the Warren Court's decisions. And even if Rawls himself remained ambiguous about the substantive implications of his theory, some of his followers in the law schools did not. In 1969, Frank Michelman's forward in the *Harvard Law Review* adopted a Rawlsian framework for analyzing income and wealth inequality.¹²⁴ Eight years later, Kenneth Karst's forward employed a Rawlsian approach to conclude that the "substantive core" of the Fourteenth Amendment was "a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."¹²⁵ The Rawlsian influence in the legal

¹²³This conclusion is consistent with what Corey Brettschneider calls "the principle of publicly justifiable privacy" that he sees implicit in Rawls. Brettschneider, "The Politics of the Personal," 25. The principle holds that "[t]o the extent that private life affects the ability of citizens to function in society and see others as free and equal citizens, it should be in accordance with public reason." Ibid.

¹²⁴Frank Michelman, "Forward: On Protecting the Poor Through the Fourteenth Amendment," *Harvard Law Review* 83 (1969). Laura Kalman writes that by 1973, Michelman was less enamored of Rawlsian solutions. Kalman, *The Strange Career of Legal Liberalism*, 67.

¹²⁵Kenneth Karst, "Forward: Equal Citizenship Under the Fourteenth Amendment," *Harvard Law Review* 91 (1977): 4.

academy did not go unchallenged, and Laura Kalman suggests that “[i]n the end, Rawls proved helpful only to legal scholars predisposed toward political liberalism who were looking for a way to justify its continuance.”¹²⁶ But in the first part of the equality era, those scholars held significant sway in the law schools and on the courts.

One of the most important legal scholars shaped by Rawlsian premises was Ronald Dworkin. Dworkin’s legal theory made explicit an important assumption underlying Rawls’s theory of justice: the protection of individual rights acted against a majoritarian conception of democracy.¹²⁷ The “constitutional conception” of democracy held out rights as “trumps” that limited majoritarian preferences to the extent that they imposed on fundamental values like “equal concern and respect.”¹²⁸ This meant that “a society in which the majority shows contempt for the needs and prospects of some minority is illegitimate as well as unjust.”¹²⁹ But Dworkin’s theory also exposed (and replicated) a tension inherent in Rawls’s theory of justice: anti-majoritarianism was conditioned on a defense of liberal values. Once illiberal minorities laid claim to fundamental liberal rights, the conflict between competing liberal claims became unavoidable: members of a group seeking to engage in illiberal practices that infringed upon the liberal rights of other members or nonmembers could also consistently claim the liberal right to group autonomy.¹³⁰ Unlike Tocqueville and Madison, Rawls and Dworkin

¹²⁶Kalman, *The Strange Career of Legal Liberalism*, 67.

¹²⁷See Ronald Dworkin, *Freedom’s Law* (New York: Oxford University Press, 1996).

¹²⁸*Ibid.*, 17.

¹²⁹*Ibid.*, 25.

¹³⁰For purposes of this argument, I am assuming that the right to group autonomy and opposing liberal rights are all *individual* rights. An individual’s right to group autonomy

fail to recognize the importance of anti-majoritarian groups irrespective of the substantive content or values of those groups. For Madison and Tocqueville, group autonomy is simply a boundary marker that doesn't engage in a substantive weighing of values. For Rawls and Dworkin, group autonomy and freedom of association are conditioned by equality, self-respect, and perhaps other liberal values. It is only when the majority fails to recognize fundamental liberal rights (as those rights are defined by Rawls and Dworkin) that strong principles of group autonomy come into play.¹³¹

D. *ROBERTS V. UNITED STATES JAYCEES*

The influence of Rawlsian liberalism and the two strands of case law that emerged over the right to exclude and the right to privacy coalesced in *Roberts v. United*

is violated if the state imposes unwanted membership requirements upon that person's group.

¹³¹I recognize that I am making a critical and perhaps controversial interpretation of Dworkin, but I think it is right. For examples of others seeing similarities between the constraining effects of Rawls's public reason and Dworkin's law as integrity, see Paul F. Campos, "Secular Fundamentalism," *Columbia Law Review* 94 (1994), 1826-27 ("Law as integrity parallels the idea of public reason legitimating the exercise of coercive state power 'in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.'"); Edward J. McCaffery, "Ronald Dworkin, Inside-Out," *California Law Review* 85 (1997), 1057 ("Dworkin's method can be understood as a form of public reason in the law."); George Rutherglen, "Private Law and Public Reason," *Virginia Law Review* 92 (2006), 1511 ("Dworkin would not have to modify much of his legal or political theory to limit the range of political discourse to what Rawls recognizes as reasonable."). But see Lawrence B. Solum, "Public Legal Reason," *Virginia Law Review* 92 (2006), 1474-75 ("Dworkin's imaginary judge Hercules sees no limit to the conceptual ascent that may be required to resolve a hard case."). Dworkin himself has resisted comparisons between law as integrity and Rawlsian public reason, arguing recently that he has "great difficulties" with Rawls's distinction "between political values on the one hand and comprehensive moral convictions on the other." Ronald Dworkin, *Justice in Robes* (Cambridge: Belknap Press, 2006), 253.

States Jaycees, the most important case on the freedom of association in the equality era. In a sweeping decision with significant consequences for associational freedom, the Court simultaneously endorsed the implicit connection between privacy and association and severely curtailed the right to exclude.

1. *The Jaycees*

The background to *Roberts* began in 1974 and 1975, when the Minneapolis and St. Paul chapters of the Jaycees began admitting women as regular members, in violation of the national organization's bylaws.¹³² According to the national organization, women could be "Associate Individual Members" who were ineligible to vote, hold office, or receive certain national awards but could "otherwise participate fully in Jaycee activities."¹³³ After the national organization threatened to revoke their charters, the two Minnesota chapters filed sex discrimination charges with the Minnesota Department of Human Rights based on the Minnesota Human Rights Act, which declared that it was an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, or sex.¹³⁴

¹³²*Roberts v. United States Jaycees*, 614.

¹³³*United States Jaycees v. McClure*, 709 F.2d 1560, 1563 (8th Cir. 1983). Cf. *Roberts*, 621 ("despite their inability to vote, hold office, or receive certain awards, women affiliated with the Jaycees attend various meetings, participate in selected projects, and engage in many of the organization's social functions").

¹³⁴Minn. Stat. § 363.03(3) (1982). The threshold question of whether the Jaycees fell under the scope of the Act as a "public accommodation" had been decided by the Minnesota Supreme Court and accepted by the federal courts as a factual determination.

In response, members of the national organization filed suit, alleging that the Act violated their rights of speech and association.¹³⁵

2. *Brennan's Opinion*

The Supreme Court upheld the constitutionality of the Act without a dissent.¹³⁶ Justice Brennan's majority opinion asserted that previous decisions had identified two separate constitutional sources for the right of association.¹³⁷ One line of decisions protected "intimate association" as "a fundamental element of personal liberty."¹³⁸ Another set of decisions guarded "expressive association," which was "a right to associate for the purpose of engaging in those activities protected by the First

¹³⁵ An important fact sometimes lost in the retelling of *Roberts* is that the litigation reflected an internal debate among the Jaycees—the national organization had sued the local Minnesota chapters. At stake were two competing visions of the future of the organization. It is plausible—perhaps even likely—that the vision favoring the full inclusion of women would have won out absent interference by the courts. In fact, as Judge Arnold pointed out in the lower court opinion, the question about whether to admit women had "been vigorously debated within the organization," and while the national organization had defeated a resolution favoring the admission of women on three occasions prior to the *Roberts* litigation, each time a larger minority had voted in favor of the resolution. *United States Jaycees v. McClure*, 1561.

¹³⁶ Burger and Blackmun recused themselves from the case: Burger had been chapter president of the St. Paul Jaycees, and Blackmun had been a former member of the Minneapolis Jaycees.

¹³⁷ *Roberts v. United States Jaycees*, 617, 618.

¹³⁸ *Ibid.*, 618. Brennan appears to have taken the category of intimate association from an influential 1980 article in the *Yale Law Journal*. See Kenneth L. Karst, "The Freedom of Intimate Association," *Yale Law Journal* 89 (1980): 629. Karst contended that *Griswold* had established a freedom of "intimate association," which Karst suggested was "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship." *Ibid.* Justice Blackmun cited Karst's article twice in his dissent in *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”¹³⁹ Expressive association to pursue “a wide variety of political, social, economic, educational, religious, and cultural ends” was “implicit in the right to engage in activities protected by the First Amendment.”¹⁴⁰

The constitutional sources of Brennan’s categories of intimate and expressive association roughly tracked the liberty argument and the incorporation argument. But in a bizarre doctrinal twist, the intimate association corresponding to the liberty argument now commanded greater constitutional protection than the expressive association corresponding to the incorporation argument, a reversal of the positions debated on the Court during the national security era. Brennan contended that intimate and expressive association represented, respectively, the “intrinsic and instrumental features of constitutionally protected association.”¹⁴¹ These differences meant that “the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.”¹⁴² As a result, any group that the Court classified as an expressive non-intimate association (the component of association derived from the incorporation argument) is invariably relegated to a lower constitutional status.¹⁴³

¹³⁹Ibid.

¹⁴⁰Ibid., 622.

¹⁴¹Ibid., 618.

¹⁴²Ibid.

¹⁴³Ibid. Cf. Aviam Soifer, *Law and the Company We Keep*, (Cambridge: Harvard University Press, 1995), 41 (contending that Brennan regarded expressive association “as instrumental and therefore subject to greater government intrusion”); George Kateb, “The Value of Association,” in *Freedom of Association*, ed. Amy Gutmann (Princeton:

Brennan began his analysis by considering whether the Jaycees was an intimate association and announced that “several features of the Jaycees clearly place the organization outside of the category of relationships worthy of this kind of constitutional protection.”¹⁴⁴ In the second section of his opinion, Brennan concluded that the Jaycees was an expressive association. He appeared to recognize the significance of the consequences of the Minnesota law to the Jaycees:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.¹⁴⁵

And in a critical comment, Brennan noted that “[a]ccording protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”¹⁴⁶ The sentiment could have come straight from Madison and Tocqueville (absent their pluralist gloss). It reflected the importance of dissenting groups that the freedom of assembly had once recognized.

Brennan quickly downplayed these concerns in light of “Minnesota’s compelling interest in eradicating discrimination against its female citizens.”¹⁴⁷ He reasoned that

Princeton University Press, 1998), 46 (“Running through Brennan’s opinion is the assumption that all nonintimate relationships are simply inferior to intimate ones.”).

¹⁴⁴Ibid.

¹⁴⁵Ibid., 623.

¹⁴⁶Ibid., 622.

¹⁴⁷Ibid., 623. Although Brennan applied strict scrutiny language to his review of the regulation of expressive association, the compelling interest that he identified in

Minnesota furthered its compelling interest by assuring women equal access to the leadership skills, business contacts, and employment promotions offered by the Jaycees.¹⁴⁸ Because the Jaycees's willingness to admit women as Associate Individual Members presumably already afforded them all of these opportunities (the associate status precluded only voting, holding office, and eligibility for national awards), it is unclear how forced admission of women as full members helped to eradicate gender discrimination in Minnesota.¹⁴⁹ But even more troubling than Brennan's failure to link remedy and harm was his claim that the forced integration of women would have *no effect* on the expressive interests of the Jaycees.¹⁵⁰ There was, according to Brennan, "no basis in the record for concluding that admission of women as full voting members [would] impede the organization's ability to engage in . . . protected activities or to disseminate its preferred views."¹⁵¹

"eradicating discrimination" easily satisfied his review. Because an interest in ending discrimination will always be implicated in a case involving anti-discrimination legislation, it is unclear how much protection strict scrutiny really offers expressive associations seeking to discriminate in their membership based on an ascriptive trait.

¹⁴⁸Ibid., 626.

¹⁴⁹ I am not suggesting that the limitations imposed on Associate Individual Members are insignificant. But the pertinent legal inquiry is whether prohibiting these limitations furthers the compelling interest in eradicating gender discrimination, and it is difficult to see how it does given the opportunities available to women as Associate Individual Members. The right to vote in a Jaycees's referendum is not the same as the right to vote in a governmental election. At the very least, the Court failed to show how its remedy of forced inclusion furthered the compelling interest that it identified.

¹⁵⁰Brennan wrote that "[T]he Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." Ibid., 626.

¹⁵¹Ibid., 627.

3. O'Connor's Concurrence

Justice O'Connor's oft-cited concurrence in *Roberts* criticized Brennan's reasoning.¹⁵² Contrary to Brennan, O'Connor viewed expressive association as more than instrumentally valuable. She asserted that: "[p]rotection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."¹⁵³ If the Jaycees was in fact an expressive association, O'Connor believed it would be entitled to protection from intrusion by the state's antidiscrimination legislation.

Rather than distinguishing between expressive and non-expressive associations, O'Connor instead proposed drawing a line between predominantly expressive and predominantly commercial organizations. She acknowledged that while the Jaycees was not a political organization, "the advocacy of political and public causes, selected by the membership, is a not insubstantial part of what it does."¹⁵⁴ Nevertheless, she reasoned that the Jaycees's attention to and success in membership drives meant that it was "first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management."¹⁵⁵ Accordingly, "[t]he State of Minnesota ha[d] a legitimate interest in ensuring nondiscriminatory access to the commercial opportunity presented by membership in the Jaycees."¹⁵⁶ For these reasons,

¹⁵²Ibid., 631 (O'Connor, J., concurring).

¹⁵³Ibid., 633.

¹⁵⁴Ibid., 639 (quoting *United States Jaycees v. McClure*).

¹⁵⁵Ibid.

¹⁵⁶Ibid., 640.

the Jaycees for O'Connor presented a "relatively easy case for application of the expressive-commercial dichotomy."¹⁵⁷

4. *The Artificiality of Intimate Association*

In my view, the most serious doctrinal flaw in *Roberts* is Brennan's distinction between intimate and expressive association. This approach to claims of group autonomy sacrifices too much out of the gates, and without a principled reason for doing so. Under Brennan's reasoning, non-intimate associations receive a lower level of constitutional protection and are assumed to be merely instrumentally valuable to expression. Moreover, almost every group facing a challenge to its autonomy will fail to meet Brennan's criteria for an intimate association. The justifications for the division between intimate and expressive association are deeply flawed and cannot be sustained upon critical reflection.

Brennan begins his argument by highlighting the role of intimate associations as groups that mediate between state and individual. Notice both the grammar and content of his argument:

[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.¹⁵⁸

Brennan's rhetoric attempts to draw the reader into a kind of Tocquevillean ethos in which intimate associations at once facilitate support for and resistance to "the Nation." But the argument lacks coherence and specificity. What exactly are the national culture

¹⁵⁷Ibid., 638.

¹⁵⁸Ibid., 618-619.

(singular) and traditions (plural) that “shared ideals and beliefs” cultivate? How do personal bonds “foster diversity” and act as “critical buffers” from state power? More to the point, why are these functions unique to intimate associations? If Brennan’s argument is that intimate associations sustain some kind of national culture through shared ideals and beliefs, why can’t non-intimate associations also serve as “schools of democracy”?¹⁵⁹ Indeed, as Nancy Rosenblum has argued: “the onus for cultivating the moral dispositions of liberal democratic citizens falls heavily on voluntary groups such as the Jaycees and their myriad counterparts.”¹⁶⁰ Conversely, if Brennan means to position intimate associations as “mediating structures” between individuals and the state,¹⁶¹ he ought to recognize that some of the largest (and least “intimate”) groups have the capacity to provide the strongest forms of resistance to incursions by the state.

Brennan next enlists cherished notions of liberty and autonomy in support of his construction of intimate association:

[T]he constitutional shelter afforded [intimate associations] reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.¹⁶²

Brennan’s phrases—emotional enrichment, defining one’s identity, and the concept of liberty—again call to mind lofty aspirations, but the meaning of his words is remarkably vague. If individuals draw “emotional enrichment” from close ties with others, then how

¹⁵⁹Alexis De Tocqueville, *Democracy in America* (Henry Reeve trans. 1899), 511.

¹⁶⁰Nancy Rosenblum, “Compelled Association,” 76.

¹⁶¹Peter L. Berger and Richard John Neuhaus, *To Empower People: From State to Civil Society* (Washington: American Enterprise Institute, 1976).

¹⁶²*Roberts v. United States Jaycees*, 619.

do they also “independently” define their own identity? And why is this understanding of identity formation central to *any* concept of liberty? Are there not notions of selfhood and liberty that recognize the interdependence rather than the independence of people?

As before, Brennan’s words fail to explain why his proffered reasons extend only to intimate associations. People form close ties with others through all kinds of associations. Some business relationships blossom into close friendships that last a lifetime; some marriages fail in a matter of months.¹⁶³ Self-definition also comes from myriad forms of associations. One’s decision to join the ACLU or to make a financial contribution to Greenpeace can speak volumes about his or her identity.

Brennan wants both to link intimate association to the central values of the American experiment and to distinguish it from other forms of association. He fails to do either, perhaps because he lacks the resources, perhaps because these kinds of distinctions are too contrived. We are left wondering whether we really inhabit a world in which this discrete category of intimate association fills the role that Brennan ascribes to it.

Despite having failed to offer a convincing justification for privileging intimate associations, Brennan introduces criteria for identifying these groups. He defines an intimate association as “distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”¹⁶⁴ He notes that factors relevant to

¹⁶³Or hours. See “Britney Spears Sheds Another Husband,” *New York Times*, Section E, August 1, 2007 (referencing Spears’s annulment of marriage to her childhood friend, Jason Alexander, 55 hours after they wed).

¹⁶⁴*Roberts v. United States Jaycees*, 620. Brennan continued that: “As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.” *Ibid.*

determining intimacy include “size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.”¹⁶⁵

The size of an association is central to Brennan’s argument. He has reported in the first part of his opinion that the Jaycees was a 295,000-member organization in 1981, the year in which the federal litigation commenced.¹⁶⁶ He now observes that even “the local chapters of the Jaycees are large and basically unselective groups.”¹⁶⁷ The Minneapolis chapter, for example, had “approximately 430 members.”¹⁶⁸ These figures are meant to push the reader toward the conclusion that the Jaycees falls clearly outside of the bounds of an intimate association. But Brennan’s numbers also direct attention away from the actual relationships that undoubtedly form in local chapters of a large national organization. It is hard to imagine the Minneapolis Jaycees meeting together without meaningful interaction between members.

Brennan’s focus on selectivity of membership as an indicator of intimacy fares even worse. Book clubs, gardening clubs, and even some recreational sports leagues are completely unselective in their membership. Yet these kinds of associations often foster intimate connections among their members. Perhaps sensing the thinness of his distinction, Brennan buttresses his argument for selectivity by citing *Tillman*, *Sullivan*, and *Daniel*, the civil rights cases holding that associations whose only selective membership criterion was race did not qualify as private clubs exempt from federal civil

¹⁶⁵Ibid., 620.

¹⁶⁶Ibid., 613 (“At the time of trial in August 1981, the Jaycees had approximately 295,000 members in 7,400 local chapters affiliated with 51 state organizations.”).

¹⁶⁷Ibid., 621.

¹⁶⁸Ibid.

rights statutes.¹⁶⁹ Those decisions were widely endorsed, but their reasoning is not self-evident, and the perils of a single selective membership requirement are less evident in situations not involving racial inequality. Moreover, the reasoning of the civil rights cases doesn't even squarely address the Jaycees because the group had not one but two conditions for full membership: gender and age.¹⁷⁰

Brennan furthers his argument about the Jaycees's lack of selectivity by observing that women and nonmembers—"strangers," actually—are present at the group's events:

[D]espite their inability to vote, hold office, or receive certain awards, women affiliated with the Jaycees attend various meetings, participate in selected projects, and engage in many of the organizations social functions. Indeed, numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, awards ceremonies, and recruitment meetings.

In short, the local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship. Accordingly, we conclude that the Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women.¹⁷¹

We are again left with words that add ambiguity without substance. For example, how do we know which activities are central to the *decision* of members to associate with one another? Similarly, on what basis can Brennan purport to know "the activity central to

¹⁶⁹*Ibid.*, 621 (citing *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and *Daniel v. Paul*, 395 U.S. 298 (1969)).

¹⁷⁰This, of course, demonstrates that the Court's real concern in *Tillman* was not that race was the only selective membership requirement but that it was a membership requirement at all. Presumably, it would have made little difference to the Court in *Tillman* if the swimming pool had restricted membership to whites under the age of fifty.

¹⁷¹*Ibid.*, 621.

the formation and maintenance of the association”? Even if he is right, what is the significance of the fact that nonmembers (“strangers to [the] relationship”) participated in “various community programs, awards ceremonies, and recruitment meetings”? Isn’t this the case with many organizations that rent space, cater events, or otherwise open their activities to the public?

One question left unanswered by Brennan’s opinion was precisely what kinds of groups could invoke the right of intimate association. Writing after *Roberts*, Douglas Linder offered some possibilities:

A four-couple bridge club or a college fraternity or sorority, for example, may satisfy Brennan’s criteria of relative smallness, selectivity, seclusion and congeniality. To the extent these associations’ “purposes” might include sharing “personal aspects of one’s life,” the match would be fairly complete. Presumably then, an interference with such an association might be vulnerable to constitutional attack.¹⁷²

In other words, with *Roberts*, the heightened protections for group autonomy extended by the freedom of assembly for almost two hundred years to dissenting religious minorities, abolitionists, suffragists, laborers, and civil rights workers had now been reduced to benefiting bridge clubs, fraternities, and sororities.¹⁷³

¹⁷²Douglas O. Linder, “Freedom of Association after *Roberts v. United States Jaycees*,” *Michigan Law Review* 82 (1984): 1886.

¹⁷³It may not even extend to fraternities and sororities. See *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007) (holding that an all-male Jewish fraternity at a state university is not an intimate association and upholding enforcement of the university’s nondiscrimination policy against the fraternity for its refusal to admit women).

E. AFTER *ROBERTS*

Roberts was not well received in academic circles, and commentators have roundly criticized Brennan's reasoning. Nancy Rosenblum observed that: "The Jaycees' 'voice' was undeniably altered once it was forced to admit young women as full members along with young men."¹⁷⁴ Aviam Soifer contested that: "Surely the Jaycees . . . will be a different organization. Surely that difference will be felt throughout an intricate web of relationships and different voices in immeasurable but nonetheless significant ways."¹⁷⁵ And George Kateb suggested that: "Brennan's claim that young women may, after their compulsory admission, contribute to the allowable purpose of 'promoting the interests of young men' is absurd."¹⁷⁶

1. *Duarte* and New York State Club Assn.

Despite its critical reception in academic circles, *Roberts* opened a large hole in the already attenuated freedom of association, and the Court followed its reasoning in two subsequent cases involving private organizations that refused membership to women. In 1987, the Court held in *Board of Directors of Rotary International v. Rotary Club of Duarte*¹⁷⁷ that the Rotary Club had no First Amendment right to exclude women. The

¹⁷⁴Nancy L. Rosenblum, "Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion," in *Freedom of Association*, ed. Amy Gutmann (Princeton: Princeton University Press, 1998), 78.

¹⁷⁵Soifer, *Law and the Company We Keep*, 40.

¹⁷⁶Kateb, "The Value of Association," 55.

¹⁷⁷*Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

following year, in *New York State Club Ass’n v. City of New York*,¹⁷⁸ the Court upheld anti-discrimination laws applied to a consortium of New York City social clubs. Justice White’s opinion narrowed the scope of expressive association by announcing that a group must demonstrate that it was “organized for specific expressive purposes” and that “it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership” to certain classes of people.¹⁷⁹ White emphasized that the right to associate was by no means absolute: it did not mean “that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution.”¹⁸⁰

2. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*

In 1995, the Court reviewed a challenge from the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) over its exclusion from a Boston parade jointly commemorating St. Patrick’s Day and Evacuation Day.¹⁸¹ Since 1947, the parade had been organized by the South Boston Allied War Veterans Council, a private organization.¹⁸² GLIB challenged its exclusion from the parade under Massachusetts’s

¹⁷⁸*New York State Club Ass’n v. City of New York*, 487 U.S. 1 (1988).

¹⁷⁹*Ibid.*, 13.

¹⁸⁰*Ibid.*

¹⁸¹*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 560 (1995). Evacuation Day commemorated the day that royal troops and loyalists fled the city during the Revolutionary War. *Ibid.*

¹⁸²Until 1992, the City permitted the Council to use the City’s official seal, provided printing services to the Council, and provided direct funding. *Ibid.*, 561. But GLIB did not contest the lower court’s conclusion that the parade did not constitute state action. *Ibid.*, 566.

public accommodations law.¹⁸³ Justice Souter's opinion for the Court rejecting GLIB's claim relied on free speech rather than free association principles. Souter first classified the parade as a form of expression.¹⁸⁴ Because the organizers were private speakers, they were free to select the content of their message.¹⁸⁵ Therefore, they could properly reject GLIB's request to march in the parade. In fact, "whatever the reason" the parade organizers had for excluding GLIB, their decision "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."¹⁸⁶ *Hurley's* free speech analysis seemed fairly straightforward, but it was difficult to reconcile with the Court's approach to association in *Roberts*, *Duarte* and *New York State Club Assn.*

3. Boy Scouts v. Dale

One final development unfolded at the close of the equality era. In 2000, the Supreme Court issued its decision in *Boy Scouts of America v. Dale*.¹⁸⁷ The Court concluded by a 5-4 vote that the right of expressive association permitted the Boy Scouts to exclude from their membership a homosexual scoutmaster despite a New Jersey

¹⁸³Ibid., 566.

¹⁸⁴Ibid., 568.

¹⁸⁵Ibid., 573. The Court also noted that the organizers wished to preclude the gay message, not gay participants.

¹⁸⁶Ibid., 575.

¹⁸⁷*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The facts of *Dale* are covered extensively in the literature. See, e.g., Jason Mazzone, "Freedom's Associations," *Washington Law Review* 77 (2002): 666-74; Evelyn Brody, "Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association," *U.C. Davis Law Review* 35 (2002): 848-54.

antidiscrimination law that prohibited such exclusions in places of public accommodation.¹⁸⁸ Chief Justice Rehnquist’s opinion for the majority began by placing the case within the framework of expressive association:

To determine whether a group is protected by the First Amendment’s expressive associational right, we must determine whether the group engages in “expressive association.” The First Amendment’s protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.¹⁸⁹

Rehnquist distanced himself from some of the Court’s earlier views on expressive association. Although *New York State Club Association* appeared to have narrowed the right of expressive association to groups that were organized “for specific expressive purposes,”¹⁹⁰ Rehnquist argued that:

[A]ssociations do not have to associate for the “purpose” of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.¹⁹¹

For Rehnquist, the proper inquiry was “whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts’ ability to advocate public

¹⁸⁸The Supreme Court deferred to the New Jersey Supreme Court’s determination that the Boy Scouts were a public accommodation within the meaning of the statute.

¹⁸⁹*Boy Scouts of America v. Dale*, 648. The Boy Scouts did not argue that they should be classified as an intimate association.

¹⁹⁰*New York State Club Ass’n v. City of New York*, 13.

¹⁹¹*Boy Scouts of America v. Dale*, 655. Justice Stevens challenged Rehnquist’s reasoning: “to prevail on a claim of expressive association in the face of a State’s antidiscrimination law, it is not enough simply to engage in *some kind* of expressive activity.” *Ibid.*, 682 (Stevens, J. dissenting).

or private viewpoints.”¹⁹² And this inquiry required that the Court defer to an organization’s purported views:

[I]t is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent. As is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.¹⁹³

These strong words hardly seemed credible after *Runyon* and *Roberts*. Justice Stevens’s dissent highlighted the doctrinal tension that *Dale* created:

[U]ntil today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State’s antidiscrimination law. To the contrary, we have squarely held that a State’s antidiscrimination law does not violate a group’s right to associate simply because the law conflicts with that group’s exclusionary membership policy.¹⁹⁴

Dale’s holding in favor of the Boy Scouts should not be mistaken as a deepening of the right of association. The Court reaffirmed the fundamental division between intimate and expressive association in *Roberts*.¹⁹⁵ After *Dale*, expressive associations are

¹⁹²*Boy Scouts of America v. Dale*, 650.

¹⁹³*Ibid.*, 651 (citations and quotations omitted).

¹⁹⁴*Ibid.*, 679 (Stevens, J., dissenting).

¹⁹⁵*Cf.* Richard A. Epstein, “The Constitutional Perils of Moderation: The Case of the Boy Scouts,” *Southern California Law Review* 74 (2000) 119, 125 (“The Supreme Court’s decision in *Dale* did not overtly challenge the conceptual framework established in *Roberts*; indeed, it self-consciously purported to build on it.”); Seana Valentine Shiffrin, “What is Really Wrong With Compelled Association?” *Northwestern University Law Review* 99 (2005) 839, 841 (“The Court’s framing of the issues [in *Dale*] grew straight out of Justice Brennan’s opinion in *Roberts v. Jaycees*.”); Andrew Koppelman, “Should Noncommercial Associations Have an Absolute Right to Discriminate?” *Law and Contemporary Problems* 67 (2004): 27, 57 (“*Dale* is a mess, but the upshot of the mess is that we still have the old message-based rule of *Roberts*.”). But see Tobias Barrington Wolff and Andrew Koppelman “Expressive Association and the Ideal of the University in the Solomon Amendment Litigation,” *Social Philosophy and Policy* 25 (2008): 101 (“The decision in *Dale* represented an enormous departure from its predecessors” and “the

no less vulnerable (even under the purported protections of strict scrutiny), and the victory for the Boy Scouts is likely more attributable to political factors present at the time of the decision than to a deepening concern for associational freedom.¹⁹⁶

At the close of the equality era, the right of association bore little resemblance to the right of assembly that had existed for almost two hundred years of our nation's history. The confluence of a growing Civil Rights movement and the dominance of Rawlsian liberalism meant that when equality of opportunity collided with group autonomy, equality won. An already attenuated right of association established during the national security era now gave way to even more incursions into group autonomy in the equality era. These developments were facilitated by an odd connection between association and privacy that produced a right of intimate association and, in doing so, jettisoned all other groups to a tenuous category of expressive association. By the end of the equality era, a right of association now quite removed from the right of assembly had fundamentally changed the nature of protections for group autonomy. In the next chapter, I delve more deeply into these changes and their consequences.

Court adopted a posture of almost complete deference to an association's claim that an antidiscrimination law's interference with decisions about a small number of members would undermine the group's expressive practice"); Samuel Issacharoff, "Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition," *Columbia Law Review* 101 (2001) 274, 297-298 (arguing that *Dale* eschewed "the functional analysis of *Roberts*").

¹⁹⁶In 2006, the Court rejected an attempt to expand the scope of *Dale* in *Forum for Academic and Institutional Rights v. Rumsfeld*, 547 U.S. 47 (2006). See generally, Wolff and Koppelman, "Expressive Association and the Ideal of the University in the Solomon Amendment Litigation."

IV. A Theory of Assembly

I have to this point narrated the stories of the rights of assembly and association. I have suggested that when we juxtapose the histories of these rights against one another, the shift from assembly to association has transgressed upon the dissenting, public, and expressive group. These changes facilitate the transmission of some liberal values into groups. But they also weaken the liberal value of group autonomy and its correlative limitation on state power. I believe this attenuated group autonomy is too great a cost to pay in our constitutional democracy. Moreover, I don't think it can be remedied within the current path dependent reasoning that has arisen in cases like *NAACP v. Alabama*, *Griswold v. Connecticut*, and *Roberts v. United States Jaycees*.¹ To restore an adequate constitutional framework for group autonomy, we need to look beyond association and recover the language and theory of peaceable assembly.

In this chapter, I provide a framework for protecting the dissenting, public, and expressive assembly. I then suggest a legal test for evaluating a claim of peaceable assembly. I close by shifting to a different mode of writing to illustrate my arguments: a hypothetical dissent in *Roberts* suggesting that assembly remains a plausible resource for group autonomy within our constitutional tradition.

¹Cf. Michael J. Gerhardt, *The Power of Precedent* (New York: Oxford University Press, 2008), 100 (discussing the role of "entrenched" judicial decisions that contribute to a "limited path dependency of precedent"). As an illustration of the entrenchment of constitutional association that precludes a robust understanding of group autonomy, consider the pervasive adherence by courts to the expressive and intimate distinction in *Roberts*.

A. ASSEMBLY AS DISSENT

The first characteristic of assembly is that it is inherently dissenting.² In previous chapters, I have shown how this characteristic has been lost with the bounded consensus accompanying the turn to association. I have traced the theoretical roots of this consensus from mid-twentieth century pluralism through Rawlsian liberalism. I have shown how the consensus excluded communist groups during the national security era and segregationist groups during the equality era. Neither communists nor segregationists make for particularly sympathetic victims of exclusion. But taken together, the experiences of these groups demonstrate that consensus is marked by a moving boundary. That boundary at any given time is set by majoritarian influences in government (particularly the federal government) and the degree to which popular sentiment supports those influences.³

If contemporary reflections about the limits of group autonomy stopped with the fate of communists and segregationists, few of us would be directly affected. But the norms underlying consensus are more pervasive than these explicit denials of autonomy, and they reach deep into the internal practices of groups. For example, a number of contemporary political theorists support imposing consensus norms, arguing that the state is justified in reshaping or even eliminating illiberal group practices through methods

²We can see why this is the case when we realize that groups happily conforming to consensus norms have little reason to invoke a claim to group autonomy.

³*Dale v. Boy Scouts of America*, in my view, fits squarely within this characterization. The Boy Scouts prevailed not because of a principled decision upholding the freedom of association but because at the close of the last century, the forced inclusion of a gay person in an organization like the Boy Scouts fell outside of the national consensus.

ranging from compulsory education to direct intervention.⁴ Nancy Rosenblum has suggested that these kinds of arguments “all aim at congruence between the internal life and practices of voluntary groups and the public culture of liberal democracy.”⁵ This “logic of congruence” requires “that not only political institutions and public accommodations but also voluntary social groups function as mini-liberal democracies, with a view toward cultivating and sustaining self-respect.”⁶ Rosenblum recognizes that under the logic of congruence, all associations are vulnerable to “the social preferences of the party in power.”⁷

Rawls’s public reason constraint leads to a similar logic of congruence. Chandran Kukathas notes the problems with the consensus norms implicit in public reason:

[I]mportant though debate may be, it is not always an adequate substitute for demonstration through practice. This is all the more so when the subject of dispute is how one should live. Not all people are capable of articulating their reasons for thinking their way of life is better—or even just better for some. (Nor, for that matter are all capable of articulating their reasons for regarding some influences as malign or corrupting.) Indeed, they may not be aware of many of the advantages (though also, of course, disadvantages) of their practices simply because these are side effects which have not much to do with why they prefer to stick to their ways. Nonetheless, in being able to live a particular way of life they may

⁴See, e.g., Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge: Harvard University Press, 2000); Brian Barry, *Culture and Equality* (Cambridge: Harvard University Press, 2001); Susan Moller Okin, “‘Mistresses of Their Own Destiny’: Group Rights, Gender, and Realistic Rights of Exit,” *Ethics* 112 (2002): 205-30.

⁵Nancy L. Rosenblum, “Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion,” in *Freedom of Association*, ed. Amy Gutmann (Princeton: Princeton University Press, 1998), 75.

⁶*Ibid.*, 92. Cf. *ibid.*, 75 (the logic of congruence “dictates that associations mirror public norms”).

⁷*Ibid.*, 90.

be quite capable of demonstrating (intentionally or not) its merits. Some need to practise in order to preach.⁸

My own argument is that the freedom of assembly facilitates “practicing in order to preach.” In this sense, my view finds some commonality with the “liberal archipelago,” Kukathas’s metaphor for “a society of societies which is neither the creation nor the object of control of any single authority” but is nevertheless “a form of order in which authorities function under laws which are themselves beyond the reach of any singular power.”⁹

Kukathas adopts the pluralist insight that “political society” is “no more than one among many associations” and “does not subsume all other associations.”¹⁰ But unlike the postwar pluralist push for consensus or the Rawlsian emphasis on stability, Kukathas proposes a more modest *modus vivendi*.¹¹ He dismisses talk of social unity as “positively undesirable, if not altogether dangerous.”¹² Stability and social value “can only be bought at the cost of toleration” because “articulating a political conception of justice, and presenting it as the first principle governing conduct in the public realm, subordinates toleration, entrenches a particular comprehensive moral conception, and excludes certain

⁸Chandran Kukathas, *The Liberal Archipelago* (New York: Oxford University Press, 2003), 138.

⁹*Ibid.*, 8-9.

¹⁰*Ibid.*, 75.

¹¹Kukathas explicitly endorses the *modus vivendi* that Rawls rejects as insufficient. *Ibid.*, 100. See also John Gray, *Two Faces of Liberalism* (New York: New Press, 2000), 19-22 (arguing that a *modus vivendi* is the best for which we can hope).

¹²*Ibid.*, 20. Nor does Kukathas think diversity is particularly important. *Ibid.*, 20, 29, 32.

moral ideals as unacceptable.”¹³ Kukathas is aware that these strong claims have consequences:

[T]his understanding of toleration does not allow us to recognize political society as a kind of moral community. It does not admit that a society as a whole (encompassing many different communities) may have certain important shared moral standards which help to define it, and which may legitimately be imposed on those who deviate from them. The understanding of toleration here, it might be argued, weakens political society.¹⁴

I am sympathetic to Kukathas’s challenges to assumptions about the merits of social unity, consensus, and stability. And his candid recognition of the costs that his alternative imposes is refreshing. Yet his argument is weakened by his metaphor of the liberal archipelago (which invokes a spatial separation between groups that belies the actual proximity, overlap, and conflict of groups in the modern nation-state), and the degree to which he ignores complications like the right to exclude and national security concerns. It would be unfair of me to press these critiques too far; Kukathas, after all, is not writing from a uniquely American perspective, and he intends his theory to apply to many kinds of liberal societies. But if we want to employ his theoretical arguments in the United States, we must take account of American constitutional history. That history includes the theoretical challenges of the right of association as it emerged during the national security era and the equality era. It forces us to confront the tensions created by a recognition of group autonomy and the ways in which our laws and judicial decisions have responded to those tensions. I will address some of these tensions in the sections that follow. Nevertheless, I am largely in agreement with Kukathas because I remain

¹³Ibid., 133.

¹⁴Ibid., 135.

skeptical of liberal claims to social unity, consensus, and stability, as well as liberalism's pretensions of neutrality.¹⁵ The failure to recognize dissenting assemblies glosses over difference; it does not resolve it. Once we acknowledge the perpetual nature of difference and dissent, *modus vivendi* becomes a reasonable possibility rather than a straw man to overcome.

B. THE PUBLIC ASSEMBLY

The second characteristic of assembly is that it is public, by which I mean it insists upon its own political space and competes with alternative notions of political life. Although not part of government, assembly rejects attempts to privatize its purpose and message as outside of the public realm. These assertions are not self-evident in contemporary political thought, where "public" is usually synonymous with "government." But early American constitutionalism recognized a public nature to nongovernmental groups. This understanding of public disappeared amidst changes to public and private that I have addressed in previous chapters. These changes redefined the meaning of public and equated it with actual or implied state authority (an example is the expansive meaning given to the category of "public accommodation"). Conversely, nongovernmental groups came to be seen as private. In the national security era, pluralists omitted nongovernmental groups from their balance wheel when they

¹⁵For more of the critique of this claim to neutrality, see my discussion of Rawls and Dworkin in Chapter Three. See also Larry Alexander, "Illiberalism All the Way Down," *Journal of Contemporary Legal Issues* 12 (2002): 630 (liberalism's "role of neutral umpire is completely chimerical").

characterized parties and pressure groups as the exclusive brokers of public power. In the equality era, nongovernmental groups lost any remaining sense of political relevance or engagement when *Griswold* and *Eisenstadt* shifted the concept of associational privacy to an individualized privacy focused on self-definition.

The problem with conflating “public” and “government” is twofold. First, the intimation that “nongovernmental” means “private” misleadingly suggests a lack of political relevance for groups to whom this label attaches. In this view, the “real” account of what it means to live together in a shared space is reserved for groups that comprise or interact with state authority, and in this way, the monist theory of the state challenged by early pluralism resurfaces in different form. The public assembly resists this conclusion and maintains that groups apart from state authority may, in fact, represent highly visible forms of politics. The meanings they “discover and assign to the world may be radically distinct from those that are assigned by the political sovereign.”¹⁶

The second problem with distinguishing between public and private based upon governmental influence or authority is that the degree to which a group’s activities approximates governmental functions is highly context dependent. The kinds of power wielded by groups do not align neatly with categories of public and private. We can see some of these problems in Amy Gutmann’s attempt to limit the scope of *Roberts* by arguing that a “small exclusive country club, whose activities consist of golf, tennis,

¹⁶Stephen Carter, *The Dissent of the Governed: A Meditation on Law, Religion, and Loyalty* (Cambridge: Harvard University Press, 1998), 27. Cf. Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (New York: Simon and Schuster, 1971).

swimming, and socializing, is private in a way that the Jaycees is not.”¹⁷ Gutmann’s argument depends on the location of the club and the supply and demand for the goods it offers. It is, in other words, highly contextualized. In some small towns, the country club may be the social hub in which networking occurs, deals are brokered, and careers are made or broken. Or the club may offer a good not available elsewhere in the town.¹⁸ In these circumstances, the club may be far more “public” than the St. Paul and Minneapolis Jaycees. If the club discriminated on the same basis as the Jaycees, it is hard to justify from a liberal theoretical perspective why it would be less subject to regulation than the Jaycees. The sad fact is that illegitimate discrimination depriving people of opportunities for growth, self-respect, social connections, and financial success occurs in all kinds of nongovernmental groups. But regulating this discrimination should not be contingent on fictional categories of public (imbued with state authority) or private (without political relevance). Many groups exist apart from government *and* significantly affect the lives and opportunities of others.

To call to mind another example, a number of academics critical of illiberal groups like the Jaycees rose to prominence within their scholarly disciplines based on exclusive and discriminatory forms of private networking. The beneficiaries of these social arrangements may take solace in the lack of overt discrimination along racial or gender lines, but more subtle forms of racism, classism, and elitism pervade much of the

¹⁷Amy Gutmann, "Freedom of Association: An Introductory Essay," in *Freedom of Association*, ed. Amy Gutmann (Princeton: Princeton University Press, 1998), 13.

¹⁸For example, the club may run an elite athletic program highly sought after by members of the town. Or perhaps some of the excluded townspeople value golf more highly than other activities and the club provides the only (or perhaps simply the best) option for golf in the area.

decisionmaking and networking that advanced their careers. Academic placements, publications, and prestigious opportunities are driven largely by personal networking among those already occupying powerful roles, and others perhaps equally or even more qualified are deprived of opportunities. It is not readily apparent how theorists of liberalism can condemn the exclusionary practices of nongovernmental groups like the Jaycees but tacitly endorse, and in fact thrive upon, the exclusionary practices of groups like the Harvard Faculty Club.¹⁹

We are better off jettisoning artificial distinctions between public and private in determining the boundaries of group autonomy. At the same time, we cannot be naïve about the tremendous power of nongovernmental economic coercion that sustains deep and widespread oppression, particularly given the quasi-governmental functions now fulfilled by many commercial organizations. But a concern for limiting the influence of these organizations should not drive us to overregulation and unnecessary incursions into the internal practices of a broad range of groups. We ought to be able to draw pragmatic even if imperfect lines of demarcation.

Justice O'Connor's *Roberts's* concurrence attempted this kind of line-drawing. But her categories of "commercial" and "noncommercial" and her assessment of how she would distinguish between them are far too subjective.²⁰ In my view, we can make a

¹⁹Cf. Matt Zwolinski, "Why Not Regulate Private Discrimination?" *San Diego Law Review* 43 (2006): 1052 ("The feeling of social isolation that results from private discrimination can be psychologically devastating. This is especially true for children, who are particularly prone to question their own self-worth in reaction to discrimination from their peers, but the effects hold for adults as well. Private discrimination can have a tremendous impact on the psychological well-being of even the most self-assured adults.").

²⁰For a partial critique of O'Connor's subjectivity, see my discussion of her *Roberts's* concurrence in the next section of this chapter.

clearer and less subjective distinction between profit-based and nonprofit entities.²¹ A reasonable starting point for this distinction is the Internal Revenue Code's classification for the kinds of groups that qualify for tax-exempt status.²² The major categories of these groups include:

- religious, charitable, scientific, and educational organizations
- civic leagues and organizations
- labor, agricultural, and horticultural organizations
- business leagues, chambers of commerce, real-estate boards, and boards of trade
- clubs “organized for pleasure, recreation, and other nonprofitable purposes,” and
- fraternal organizations²³

²¹I recognize that the term “nonprofit” is itself somewhat vague and imprecise. But it is preferable to other terms (like “noncommercial”) already entrenched in discussions about the limits of group autonomy.

²²It may be useful at this point to address an objection to my line-drawing based upon the subsidization of nonprofits through tax exemptions. The Supreme Court has noted that “both tax exemptions and tax-deductibility are a form of subsidy” because “[a] tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income” and “[d]eductible contributions are similar to cash grants of the amount of a portion of the individual’s contributions.” *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). Indeed, “every tax exemption constitutes a subsidy that affects non-qualifying taxpayers, forcing them to become indirect and vicarious ‘donors.’” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989). I have no objection to these characterizations of tax benefits. On one level, they demonstrate the practical challenges confronted by any group attempting to remain truly private in the United States. But as a practical matter, we need to look beyond widely available tax benefits for indicators of government sponsorship because “[t]he expansion of the modern state means that most civil associations are now entangled with it in one way or another.” William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (New York: Cambridge University Press, 2002), 114.

²³See Internal Revenue Code § 501(c)(1-8) (2008). The largest class of exempt organizations is covered in subsection (c)(3), which includes “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals. . . .”

Groups falling within these conceptual categories should fall under the protections of assembly irrespective of their legal status under the Code.²⁴ To this end, it is necessary to make two important modifications to the IRS classifications to prevent an exception from swallowing the rule: (1) lifting the restriction against political advocacy applied to some groups; and (2) removing the public policy constraint.

The restriction against political advocacy applies to religious, charitable, scientific, and educational groups, and groups that choose to engage in political advocacy jeopardize their tax-exempt status.²⁵ Irrespective of the wisdom of this policy decision, it makes no sense to extend the exemption restriction to the definition of peaceable assembly, which explicitly envisions the kinds of dissenting, public, and expressive groups that might engage in political advocacy.

The public policy constraint stems from the Internal Revenue Service's decision to revoke federal tax-exempt status to groups that discriminated on the basis of race but otherwise met the exemption criteria. The Supreme Court endorsed this IRS policy in *Bob Jones University v. United States*.²⁶ To reach its result, the Court concluded that

²⁴This is admittedly an extremely broad definition. It would include, for example, a book club (which in most cases is hard to envision as a dissenting, public, and expressive assembly) and a private research university (which wields tremendous power and influence even though technically "not for profit." I am by no means suggesting that the "not for profit" distinction is flawless, but it does improve upon the subjectivity and whimsicality of other attempts at line-drawing.

²⁵See *ibid.*, § 501(c)(3) ("no substantial part" of group's activities can be "carrying on propaganda, or otherwise attempting, to influence legislation" and group cannot "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

²⁶*Bob Jones University v. United States*, 461 U.S. 574 (1983).

underlying the tax code was “the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”²⁷ But whether the tax code treats a group as tax-exempt is a different matter than whether that group may appeal to the protections of assembly.²⁸ In my view, we ought to protect the broadest possible range of peaceable assembly, including those assemblies whose beliefs and practices we find detestable.

Importantly, I make no claim that the tax-exempt distinction perfectly curtails the use of quasi-governmental power. Coercive private power remains in the Jaycees, the Moose Lodge, and the Boy Scouts. It also exists in the local country club, the Harvard Faculty Club, residential community associations, private colleges and universities, and many other groups.²⁹ But protecting the autonomy of diverse groups that are neither governmental nor profit oriented means allowing for some of these uses of power.

On a theoretical level, this position is at odds with the private desegregation cases like *Tilman* and *Sullivan*. But it is important not to let theory over-determine results, particularly when we are talking about the very real effects of law. In theory, it would be highly problematic if the kind of peaceable assembly for which I am arguing legitimated widespread and systematic suppression on the basis of race, gender, ethnicity, religion, or sexual preference. In theory, the autonomy that I am arguing for all nongovernmental,

²⁷*Ibid.*, 586. The Court determined that “there can be no doubt as to the national policy” against racial discrimination. *Ibid.*, 598.

²⁸The contrast is roughly that between *Norwood* and *Runyon*. See Chapter 3.

²⁹See generally Rosenblum, *Membership and Morals* (discussing the power residing in some of these groups).

nonprofit groups opens the door for that possibility in sectors like higher education. In practice, there is no plausible argument that this will be happening in contemporary American society.³⁰ A closer issue, much discussed in multiculturalist literature, is whether the state should permit private primary and secondary education of children to reinforce illiberal norms.³¹ But the objection is that these forms of education are reinforcing illiberal and at times intolerant perspectives, not that these forms of education are excluding or depriving others of opportunities. That, I think, is a small price for liberalism to pay for a genuine recognition of group autonomy.

C. ASSEMBLY AS EXPRESSION

The final characteristic of assembly that I wish to highlight is that its very existence is a form of expression. The expressive assembly embraces a broad conception of the coherence and meaning of communal acts. It recognizes communicative possibility in joining, excluding, gathering, proclaiming, engaging, or not engaging. This understanding of expression is curtailed by the *Roberts* construction of expressive association, which reduces the group to an instrumental shell that merely facilitates more limited modes of expression. But there is no reason to negate the expressive meaning of the group itself. By way of analogy, the First Amendment category of symbolic speech

³⁰If the political arrangements in the United States were ever to return to a situation where this was a genuine possibility, the specific boundaries that I have drawn might need to be rethought.

³¹See, e.g., Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge: Harvard University Press, 2000); Amy Gutmann, *Democratic Education* (Princeton University Press 1999). For a critique of these perspectives offering a different alternative, see Romand Coles, *Beyond Gated Politics: Reflections for the Possibility of Democracy* (Minneapolis: University of Minnesota Press, 2005), 239-63.

embraces a wide range of activities that aren't intuitively communicative: flag burning, camping, and nude dancing, among others.³² Given the breadth of free speech doctrine, it is problematic to construe group expression more narrowly. Nevertheless, determining the meaning of a group or its actions is not a simple matter. Two examples from case law illustrate this point.

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,³³ the Court concluded that the Mormon Church could deny a non-church member employment as a building engineer in a gymnasium operated by the church and open to the public. Although decided on Establishment Clause grounds, the case raised important questions about the meaning of group expression. We can see this in the district court's conclusion that none of the engineer's duties at the gym were "even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration."³⁴ As Justice Brennan argued in his concurrence, "the character of an activity is not self-evident."³⁵ It might be, for example, that the gym provided a forum for ministry and outreach that the Mormons viewed as intricately tied to their

³²See *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (Court assumes that "sleeping in the park" might be expression covered by the First Amendment but upholds ban on overnight sleeping as a content neutral restriction); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) ("nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so").

³³*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

³⁴*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 594 F.Supp. 791, 802 (Utah 1984).

³⁵*Amos*, 343 (Brennan, J., concurring).

purposes and values. If that were the case, then the engineer's role might well matter to the expressive purposes of the group. As to whether the Mormon Church should be permitted to "condition employment in certain activities on subscription to particular religious tenets," Brennan wrote that: "[w]e are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities."³⁶ Brennan's arguments may have special force with respect to religious groups, but they are also generalizable to nonreligious groups. They hint at the difficulty in determining the expressive purpose and meaning of a group's activity *from the outside*.

Amos highlights the difficulties of interpreting whether a discrete activity reflects the purposive expression of a group. *Roberts* illustrates a related but more complicated question: how to characterize the nature of a group as a whole.³⁷ Recall that Justice O'Connor's concurrence concluded that the Jaycees' attention to and success in membership drives meant that it was "*first and foremost*, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management."³⁸ Other language in her concurrence suggested an even lower bar for classifying an association as commercial:

In my view, an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's

³⁶*Ibid.*, 342-43.

³⁷Cf. Rosenblum, *Membership and Morals*, 6 ("There are always alternative understandings of an association's nature and purpose, and competing classifications.").

³⁸*Roberts v. United States Jaycees*, 639 (O'Connor, J., concurring) (emphasis added).

activities are not predominantly of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard.³⁹

O'Connor's reasoning here is problematic on three counts. First, as Larry Alexander notes, "[l]aws regulating membership in *any* organization—including commercial ones—will affect the content of that organization's expression."⁴⁰ Second, O'Connor's requirement that an association be "predominantly engaged" in protected expression to avoid being classified as commercial leaves vulnerable to regulation associations that because of their size or unpopularity must devote a substantial portion of their activities to fundraising or other commercial activities.⁴¹ Finally, it is unclear which activities are "of the type protected by the First Amendment." For example, while the scope of the Jaycees's activities is absent from the descriptions provided in either the Court's opinion or O'Connor's concurrence, Judge Arnold's opinion in the court below explains that:

Some of what local chapters do is purely social. They have parties, with no purpose more complicated than enjoying themselves. Some of it is civic. They have conducted a radio fund-raising drive to combat multiple sclerosis. They have conducted a women's professional golf tournament. They have engaged in many other charitable and educational projects for the public good. (And there is no claim, incidentally, of any discrimination in the offering to the public of the benefits of these projects. Money raised to fight disease, for example, is not used to benefit only male patients.) And they have advocated, through the years, a multitude of political and

³⁹Ibid., 636.

⁴⁰Larry Alexander, "What is Freedom of Association and What is Its Denial?" *Social Philosophy and Policy* 25 (2008): 7.

⁴¹One of the clearest illustrations of this consequence is the effect of charitable solicitation regulation on small or unpopular charities. See, e.g., *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 799 (1988). See also John Inazu, "Making Sense of *Schaumburg*: Seeking Coherence in First Amendment Charitable Solicitation Law" *Marquette Law Review* 92 (2009) (forthcoming).

social causes. Governmental affairs is one of the chief areas of the organization's activity. Members on a national, state, and local basis are frequently meeting, debating issues of public policy, taking more or less controversial stands, and making opinions known to local, state, and national officials.⁴²

Arnold elaborated that:

The Jaycees does not simply sell seats in some kind of personal-development classroom. Personal and business development, if they come, come not as products bought by members, but as by-products of activities in which members engage after they join the organization. These activities are variously social, civic, and ideological, and some of them fall within the narrowest view of First Amendment freedom of association.⁴³

His view is consistent with the Jaycees' own assertions that they were:

. . . organized for such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.⁴⁴

Parsing which of these activities constitute the organization's "predominate" activities is a difficult interpretive task, and one in which O'Connor shows no signs of having engaged.

In contrast to O'Connor's thin characterization of the Jaycees, we might consider Iris Marion Young's rich description of separatist groups in the women's movement. Young writes that:

⁴²*United States Jaycees v. McClure*, 1569.

⁴³*Ibid.*

⁴⁴*Roberts v. United States Jaycees*, Brief of Appellee United States Jaycees, 1984 U.S. S. Ct. Briefs LEXIS 237 at *5.

Feminist separatism rejected wholly or partly the goal of entering the male-dominated world, because it requires playing according to the rules that men have made and that have been used against women, and because trying to measure up to male-defined standards inevitably involves accommodating or pleasing the men who continue to dominate socially valued institutions and activities. Separatism promoted the empowerment of women through self-organization, the creation of separate and safe spaces where women could share and analyze their experiences, voice their anger, play with and create bonds with one another, and develop new and better institutions and practices.

Most elements of the contemporary women's movement have been separatist to some degree. Separatists seeking to live as much of their lives as possible in women-only institutions were largely responsible for the creation of the women's culture that burst forth all over the United States by the mid 1970s, and continues to claim the loyalty of millions of women—in the form of music, poetry, spirituality, literature, celebrations, festivals, and dances. Whether drawing on images of Amazonian grandeur, recovering and revaluing traditional women's arts, like quilting and weaving, or inventing new rituals based on medieval witchcraft, the development of such expressions of women's culture gave many feminists images of a female-centered beauty and strength entirely outside capitalist patriarchal definitions of feminine pulchritude. The separatist impulse also fostered the development of the many autonomous women's institutions and services that have concretely improved the lives of many women, whether feminists or not—such as health clinics, battered women's shelters, rape crisis centers, and women's coffeehouses and bookstores.⁴⁵

Young's reference to movements, institutions, and culture encompasses a host of groups with diverse and multifaceted purposes. Their free expression preserved a space of difference and a different form of the political. Indeed, Young's description of the women's movement captures much of what I am trying to convey about the meaning of assembly. But it is predicated on a refusal to focus only on the separatism of these groups. Of course, it is important to recognize that the women's groups that Young describes were situated much differently than a group like the Jaycees. But the groups

⁴⁵Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), 161-62.

share in common a desire to have the multidimensional nature of their activities and purposes protected against those who seek to silence them.

D. A LEGAL FRAMEWORK FOR ASSEMBLY

With the above discussion as an extended prolegomenon, I now want to set out a possible legal framework for the right of assembly. But first it is important to note that my argument for assembly does not claim that unbounded group autonomy is either preferable or possible. To borrow from Stanley Fish, there is “no such thing as free assembly.”⁴⁶ The state always constrains. The pertinent inquiry is therefore not whether the state can constrain group autonomy, but the conditions under which those constraints will be imposed. In response to *this* question, liberalism itself offers some tentative answers. For example, Galston argues that “[l]iberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit” and “against external interference with individual and group endeavors.”⁴⁷ And Jeff Spinner-Halev adds that liberalism’s traditional strength “is its ability to balance different

⁴⁶Stanley Fish, *There’s No Such Thing as Free Speech, and It’s a Good Thing, Too* (New York: Oxford University Press, 1994), 104 (“Speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict.”). Cf. Peter de Marneffe, “Rights, Reasons, and Freedom of Association,” in *Freedom of Association*, ed. Amy Gutmann (Princeton: Princeton University Press, 1998), 146 (“Some may think of rights as ‘absolute,’ believing that to say that there is a *right* to some liberty is to say that the government may not interfere with this liberty for *any* reason. But if this is how rights are understood, there are virtually no rights to liberty—because for virtually every liberty there will be *some* morally sufficient reason for the government to interfere with it.”).

⁴⁷William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002), 3.

and important values, between autonomy and pluralism, equality, and tolerance,” and a “liberalism without balance is too much in danger of overreaching itself.”⁴⁸

Embodying these aspirations requires a different framework than that provided by the right of association. I now propose one such alternative framework. My analysis proceeds in two stages. First, it asks whether a group is a peaceable assembly. This definitional question requires subjective judgment but no balancing of interests. Second, it asks whether the autonomy of a peaceable assembly should be curtailed or undermined in furtherance of some other interest. As I discuss below, these interests might include enforcing the criminal law, protecting national security, administering medical care to minors, and overcoming extreme economic coercion. In my view, the balancing of interests in the latter stage should weigh heavily in favor of the assembly and infringement on group autonomy should be exceedingly rare.

1. Threshold Requirements of Peaceable Assembly

The first part of my legal test is whether a gathered group constitutes a peaceable assembly. To meet this threshold, I suggest that the group must be:

- nongovernmental
- nonprofit
- externally peaceable
- internally peaceable

I recognize that there is some subjectivity in choosing these initial criteria. But as I explain below, these limitations are both sensible and coherent in light of the history and tradition of the right of assembly.

⁴⁸Jeff Spinner-Halev, “Autonomy, Association, and Pluralism,” in *Minorities Within Minorities: Equality, Rights and Diversity* eds. Avigail Eisenberg and Jeff Spinner-Halev (New York: Cambridge University Press, 2005), 161.

The nongovernmental requirement arises from the recognition that assembly protects forms of gathering outside of state activity. Compelled integration in public schools raises no serious concerns about a “right to exclude” in a framework of assembly because the people gathered as part of a government-sanctioned group have no vested interest in the composition or entry requirements of that group. The legal test for the nongovernmental nature of an assembly can be drawn from the constitutional framework for what constitutes “state action.” But it cannot in my view completely adopt the state action doctrine, which, as a legal fiction, has extended to a number of non-state actors and settings. Thus, for example, my understanding of the nongovernmental requirement would not exclude (in the first stage of the assembly analysis) the community park in *Sullivan v. Little Hunting Park*,⁴⁹ the swimming pool in *Tilman v. Wheaton-Haven Recreation Assn.*,⁵⁰ or the private school in *Runyon v. McCrary*.⁵¹ Nor would it adopt the “public accommodation” language that the Court has applied to groups like the Boy Scouts and the Jaycees.

The second threshold requirement is that the group must be not for profit. There is nothing in the text of the right of assembly that precludes commercial entities, but doing so is, to my understanding, the only way that we can begin to account for the significant changes between public and private in the past century that have not only depoliticized the kinds of groups that contribute to our democratic experience but also transfused power to groups that threaten to undermine democracy through unchecked

⁴⁹*Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

⁵⁰*Tilman v. Wheaton-Haven Recreation Assn., Inc.*, 410 U.S. 431 (1973).

⁵¹*Runyon v. McCrary*, 427 U.S. 160 (1976).

market forces. As I argued in the preceding section, the nonprofit category should encompass all groups that would qualify as tax-exempt under the Internal Revenue Code (after lifting the political advocacy and public policy constraints).

The final two definitional requirements I propose stem from the limit of peaceability in the text of the First Amendment's assembly clause. Because peaceability and the related concept of harm can be stretched to encompass any number of coercive actions, it is important at this stage of the legal test to limit its reach to acts or threats of *physical violence to body or property*. This standard is akin to John Stuart Mill's defense of "freedom to unite, for any purpose not involving harm to others."⁵²

External peaceability is relatively easy to identify: riots, conspiracies, and other forms of gathering that plot or enact physical violence are excluded from the protections of free assembly. But the history of assembly makes painfully evident that even this standard remains vulnerable to manipulation. *Dennis* and other cases during the height of McCarthyism attest that courts are capable of gross misconstructions of what transgresses external peaceability.

Internal peaceability pertains to harms inflicted by members of a group upon other members of the group. The most cited examples of internal harms include child and spousal abuse, and the withholding of medical care for children on religious grounds. For reasons that I hope will be apparent (even if not persuasive), I make an analytical distinction between those acts that directly inflict harm (like child and spousal abuse) and those that might lead to harm (like the withholding of medical care). Consistent with my

⁵²John Stuart Mill, *On Liberty* (New York: Norton, 1975), 13.

approach to external peaceability, I treat the former as outside of the bounds of peaceable assembly. But I defer consideration of the latter to the second stage of my analysis.⁵³

2. Balancing the Interests

The constitutional protections for group autonomy only extend to peaceable assembly. When a group falls outside of this definition, courts have no interests to balance. But once a group has satisfied the four requirements of a peaceable assembly, we should recognize that *any* restriction on that group infringes upon the constitutionally protected value of group autonomy. In my view, the interpretive difficulties we face in attempting to construe the meaning, purpose, and value of a group's actions or practices justify a strong presumption in favor of any claim to group autonomy by a peaceable assembly. For this reason, we must resist jumping too quickly to familiar constitutional balancing tests or even the language of "strict scrutiny" applied in evaluating regulations affecting expressive associations. Otherwise, we risk succumbing to what Robert Cover called the state's "jurispathic" tendencies.⁵⁴ Nevertheless, it is possible to overcome the presumption favoring group autonomy. Recognizing exceptions is not a weakness of the

⁵³To state this more directly, I do not consider the withholding of medical care for religious reasons to exclude a group from the definition of a peaceable assembly.

⁵⁴Martha Minow defines "jurispathic" as referring to "the power and practice of a government that rules by displacing, suppressing, or exterminating values that run counter to its own." Martha Minow, "Introduction," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, eds. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1992), 1-2. Minow writes that Cover "set in motion three captivating arguments: (1) government should be understood as one among many contestants for generating and implementing norms; (2) communities ignored or despised by those running the state actually craft and sustain norms with at least as much effort and worth as those espoused by the state; and (3) imposition of the state's norms does violence to communities, a violence that may be justifiable but is not to be preferred a priori." Ibid., 2.

theory but simply an acknowledgment that at some point other interests outweigh the value of protecting the practices of the group. I can think of four examples of when a competing interest *might* trump a claim to group autonomy by a peaceable assembly.⁵⁵

a. Criminal Law

The first interest that might overcome a claim to peaceable assembly is a violation of the criminal law not involving harm to people or property.⁵⁶ I leave this open to a balancing analysis because the non-violent violation of a criminal law should not mean a *per se* exclusion from the protections of peaceable assembly. That would preclude all forms of civil disobedience and attempts to inculcate alternative practices and ways of life by knowingly violating the law.⁵⁷ Our constitutional history is replete with examples of oppressing nonviolent practices out-of-step with majoritarian values: upholding anti-

⁵⁵It is important to note that one can disagree with the weight that I assign to these competing interests and the balancing that I propose and still endorse my call to return to the language of peaceable assembly.

⁵⁶Recall that the first stage of my analysis holds that groups whose actions physically harm people or property do not fall within the scope of peaceable assembly.

⁵⁷A peaceable assembly might construe an act underlying civil disobedience as other than a violation of the criminal law. See Robert Cover, "Nomos and Narrative," *Harvard Law Review* 97 (1983), 46-47 ("[T]he community that has created and proposed to live by its own, divergent understanding of law makes a claim not of justifiable disobedience, but rather of radical reinterpretation. If one addresses the status of 'civil disobedients' from the perspective of the state's courts, one can hardly avoid framing the jurisprudential question as one of the individual's obligation to the state's law. From a general jurisprudential perspective, however, to concede so central a role to the courts (in any sense other than as a sociological datum—that is, a recognition that courts in the United States do wield the heaviest stick and, as a result, are often the voice most carefully attended to) is to deny to the jurisgenerative community out of which legal meaning arises the integrity of a law of its own.").

polygamy laws targeted at Mormons,⁵⁸ enforcing injunctions against civil rights protesters,⁵⁹ enforcing anti-sodomy laws against gay men,⁶⁰ and prohibiting the use of peyote in Native American religious ceremonies,⁶¹ to name a few. Nevertheless, there may be some instances when a violation of the criminal law not involving harm to people or property overcomes a claim to peaceable assembly. Otherwise, the claim of assembly could be used to circumvent any law passed in furtherance of the health and welfare of society. For example, in my view, the state's interest in preventing drug abuse would trump the assembly claim of a group wanting to use heroin or methamphetamines.⁶² Similarly, a brothel could not raise an assembly claim to subvert the state's anti-prostitution laws. A more commonplace example might be a protest or demonstration that blocks access to a public good or route, in violation of an anti-loitering law. Each of these groups is a nongovernmental, noncommercial, peaceable assembly, but each one might nevertheless face restrictions based upon its violations of the criminal law.

⁵⁸*Reynolds v. United States*, 98 U.S. 145 (1878).

⁵⁹See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

⁶⁰*Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁶¹*Employment Division v. Smith*, 494 U.S. 872 (1990).

⁶²The societal harms caused by these drugs are clearly on a much different order than the harms associated with the use of small amounts of peyote. An interesting question is how a group claiming a right to ingest peyote for other than religious reasons would fare under my assembly test. I think it is the case that the group would be protected by the right of assembly. But this doesn't mean the inevitable demise of an anti-peyote drug law: the balance might tip in favor of the state's interest if the peyote use became particularly frequent or widespread.

b. National Security

There may be instances where national security concerns override a claim to peaceable assembly. For example, if a church sheltered a terrorist who had knowledge of an imminent attack (perhaps out of the not implausible concern that the government might use unethical methods of interrogation on the terrorist), the state's national security interest might overcome the church's claim to peaceable assembly. But our history shows that state officials are too often swayed by frenzied interests dressed as national security concerns. To provide maximum protection against this abuse of power, an override of peaceable assembly for national security reasons should require nondelegable approval authority from the President. This high level of approval authority already exists in another context when national security interests might override a claim to peaceable assembly. The Taft-Hartley Act grants jurisdiction to federal district courts to enjoin a labor strike that threatens "national health or safety" upon petition of the Attorney General at the direction of the President.⁶³ Taft-Hartley injunctions must meet a high standard: they have been sought only thirty-three times, and courts have held that the national health or safety standard cannot be met solely by economic concerns but must pertain to a colorable threat to national security.⁶⁴ Any expansion of this kind of

⁶³29 U.S.C. §§ 176-180.

⁶⁴Compare *United States v. Avco Corp. Lycoming Division, Statford, Conn.*, 270 F.Supp. 665 (D. Conn. 1967) (strike of workers at military aircraft and aircraft engine plant that produced engines or components for aircraft being used in combat in Vietnam "would indeed be a strike at the jugular vein of the United States and of the free world"), with *United States v. International Longshoremen's Ass'n, AFL-CIO, Local 418*, 335 F.Supp. 501 (D. Ill. 1971) (Taft-Hartley "precludes the enjoining of a strike on purely economic grounds absent some element of national defense" and strike was "totally devoid of any threat to the national defense or any war effort as such.").

infringement on peaceable assembly outside of the labor context should require a similarly high threshold.

c. Withholding of Medical Care

I have left as an open question subject to balancing whether the state's interest in forcing the provision of its medical care on children is enough to overcome a group's claim to peaceable assembly. I share Chandran Kukathas's suspicion that the condemnation of "non-standard medical treatments" gives us no reason to assume that the state's judgment will be any less subject to abuse.⁶⁵ Kukathas suggests that a less interventionist approach could rely on "the pressures of civil association more generally, which induce a measure of conformity to the standards of the wider society."⁶⁶ I am not as optimistic as he is about the openness of groups to the pressures of proximate associations. But I share his concern about unreflective endorsement of the alternative, even in the "extreme cases" that on first glance appear to call for intervention. The risk of jumping to conclusions is highest when we encounter practices that strike us as particularly distasteful. For example, although William Galston calls for a fairly broad form of liberal pluralism, arguing that "there can be no presumption that a state may intervene in [voluntary] associations just because they conduct their internal affairs in

⁶⁵Kukathas, *The Liberal Archipelago*, 143-48. Kukathas argues in response to Brian Barry's argument for using the state to protect the interests of children "as far as possible."

⁶⁶*Ibid.*, 147. Cf. *ibid.*, 143-44 ("in a society governed by toleration, it is not going to be possible for individuals or groups easily to arrogate to themselves the power to do entirely as they wish with others—including their children" because "they will be bound by the norms or conventions or the laws of the communities to which they belong—which may in turn be shaped by requirements laid down by other associations of which these groups are themselves parts.").

ways that diverge from general public principles,” he also contends that a civil association cannot “endanger the basic interests of children by withholding medical treatment in life-threatening situations.”⁶⁷ For Galston, this example is beyond challenge. But determining a child’s basic interests with respect to medical care or even what constitutes a “life-threatening situation” is a complex assessment for which there is not always a clear answer. By way of example, Kukathas writes that “[p]ractising Christian Scientists, who forswear many conventional medical treatments such as immunizations (for themselves and their children), tend to do better on the standard health indicators: longevity, rates of illness, incidence of heart disease and cancers, and others.”⁶⁸ As he rightly notes, few important questions have been resolved beyond dispute: “within liberal societies, there is no settled consensus on a great range of questions about such things as proper medical practice, physician-assisted suicide, or abortion—or about what children should properly be taught about the world and their place in it.”⁶⁹ Even acts that seem grossly inegalitarian or harmful to Western minds might appear less so from a different perspective.⁷⁰ Nevertheless, there will be some instances of withholding medical care

⁶⁷Galston, *Liberal Pluralism*, 9, 112, 114.

⁶⁸Kukathas, *The Liberal Archipelago*, 138 n.56. See also John Howard Yoder, “Response of an Amateur History and a Religious Citizen,” *Journal of Law and Religion*, 7 (1989), 428 (arguing against the “therapeutic orthodoxy of the American Medical Association” trumping “the responsibility to care for the health of my children in light of the particular version of psychosomatic wellness coherent with our family’s belief system”).

⁶⁹*Ibid.*, 145.

⁷⁰See, e.g., Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press, 2005), 187 (arguing that the “constraining nature” of opportunities for female mosque participants may “nonetheless represent forms of reasoning that must be explored on their own terms if one is to understand the structuring conditions of this form of ethical life and the forms of agency they entail”).

that overcome the presumptive validity of a claim to group autonomy by a peaceable assembly.

d. Extreme Economic Coercion

The final area in which I can envision a balancing of interests negating a claim to free assembly is when the surrounding economic context is so coercively aligned against a particular class of persons that the basic civil rights of that class are unattainable without intervention in the internal practices of nongovernmental, nonprofit groups. In my view, this interest justifies the decisions like *Tilman*, *Sullivan*, and *Runyon* during the Civil Rights era: the pervasive status of Jim Crow warranted incursions into group autonomy even for acts of private segregation. But I believe these decisions reflect the *only* instance in recent American history favoring incursion into group autonomy on the basis of overcoming extreme economic coercion.

E. THE MISSING *ROBERTS* DISSENT

Having now laid out a legal framework for assembly, I conclude this chapter with a thought experiment positing what a *Roberts* dissent premised on the right of assembly might have looked like. One reason for looking beyond the confines of the right of association in *Roberts* is the law's capacity to employ different theories in addressing constitutional questions. *Roberts* itself suggested two distinct reasons for denying associational protection to the Jaycees. The majority rooted its analysis in the idea of expressive association, concluding that Minnesota's compelling interest in eradicating gender discrimination overrode the Jaycees's right to expressive association. Justice O'Connor, in contrast, determined that the Jaycees's status as a commercial organization

placed it outside the protections of association. Both arguments were offered as reasons for ruling against the Jaycees. But multiple reasons also weigh in favor of the Jaycees. One argument for the Jaycees is that a proper understanding of strict scrutiny applied to regulations affecting the right of association should protect group autonomy in the circumstances presented in *Roberts*. This is a claim from within the framework of association, but it is weakened by Brennan's bifurcation of intimate and expressive association. A different argument for protecting the Jaycees is that their peaceable mode of gathering does not transgress the boundaries of the right of assembly.

In my view, assembly provides a stronger argument than association by suggesting a different way of conceiving of group autonomy. It rejects the dichotomization of expression (through "speech") and background practice (through "association") and insists that the assembly that gathers is itself a form of expression. It draws upon historical resources that emphasize the public and political role of groups unattached to state and government. And it invokes a tradition of dissent that cautions us to tread carefully in assuming or imposing consensus or majoritarian norms.

My hypothetical dissent incorporates the ideas discussed in this chapter and demonstrates how an analysis premised on the right of association undermines group autonomy. I have anachronistically attributed this dissent to Justice Rutledge, who authored the majority opinion in *Thomas v. Collins*.⁷¹ That opinion, which I discussed in my first chapter, marks the high point of the Court's recognition of the right of assembly. I am also in agreement with Aviam Soifer's suggestion that Rutledge's "dynamic, relational language" emphasized that the right of assembly was "broad enough to include

⁷¹*Thomas v. Collins*, 323 U.S. 516 (1945).

private as well as public gatherings, economic as well as political subjects, and passionate opinions as well as factual statements.”⁷² Soifer argues that the principles articulated in *Thomas* “starkly contrast with the instrumental focus of more recent freedom of association decisions,” and I believe that we would have seen this contrast in a *Roberts* dissent premised on the right of assembly.⁷³

⁷²Aviam Soifer, *Law and the Company We Keep* (Cambridge: Harvard University Press, 1995): 77, 78.

⁷³*Ibid.*, 78.

ROBERTS, ACTING COMMISSIONER, MINNESOTA
DEPARTMENT OF HUMAN RIGHTS, ET AL. v. UNITED STATES
JAYCEES

No. 83-724

SUPREME COURT OF THE UNITED STATES

Argued April 18, 1984

Decided July 3, 1984

Rutledge, J., dissenting.

Respondent United States Jaycees is a nongovernmental, nonprofit group that desires to exclude women from its membership. Because its practices are protected by the right of peaceable assembly, *see* U.S. Const., Amend. I, I would affirm the decision below. However much I may disagree with those practices or their direct and indirect consequences, they fall within the boundaries of peaceable assembly. The majority's decision to resolve this case under a different standard fails to account for the role of free assembly in our constitutional scheme and jeopardizes the tradition of dissent and free expression long recognized in this country.

I.

The right peaceably to assemble has been part of our constitutional history for almost two hundred years. It guards "not solely religious or political" causes but also "secular causes," great and small. *Thomas v. Collins*. Although its "most pristine and classic form" may manifest in a physical gathering such as a protest or strike, *Edwards v. South Carolina*, our decisions have never limited assembly to discrete physical gatherings. To the contrary, we have expressly relied on the right of assembly to invalidate convictions for participating in meetings (*De Jonge v. Oregon*), organizing local chapters of a national group (*Herndon v. Lowry*), and speaking publicly without a proper license (*Thomas v. Collins*). We have also observed that the freedom of assembly is implicated in the forced disclosure of a group's membership list (*NAACP v. Alabama*). As Justice Douglas has noted:

Joining a lawful organization, like attending a church, is an associational activity that comes within the purview of the First Amendment, which provides in relevant part:
"Congress shall make no law . . . abridging the freedom of

speech, or of the press; or the right of the people, peaceably to assemble, and to petition the government for a redress of grievances.” “Peaceably to assemble” as used in the First Amendment necessarily involves a coming together, whether regularly or spasmodically. . . . Assembly, like speech, is indeed essential in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. The holding of meetings for peaceable political action cannot be proscribed. A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.

Gibson v. Florida Legislative Investigation Committee (Douglas, J., concurring).

The right of assembly “cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.” *De Jonge v. Oregon*. Indeed, as we announced in *West Virginia v. Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

See also Bates v. City of Little Rock (“Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty.”). In Justice Brandeis’s well-known words:

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion

affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California (Brandeis, J., concurring). Only “the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” *Thomas v. Collins*.

II.

The majority fails to recognize the importance of protecting even those dissenting practices out of step with popular views or values. As we noted in *Gilmore v. Montgomery*, “[t]he freedom to associate applies to the beliefs we share, and to those we consider reprehensible” and “tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.” In that same decision, we quoted approvingly Justice Douglas’s assertion that “[t]he associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.” *Gilmore v. Montgomery* (quoting *Moose Lodge No. 107 v. Irvis* (Douglas, J., dissenting)).

Our nation has protected the right of assembly for dissenting groups throughout its history. These groups often expressed views antithetical and even threatening to those who held political power. They included the Democratic-Republican Societies of the 1790s, suffragists and abolitionists of the antebellum era, and groups advocating on behalf of labor, women, and racial minorities in the twentieth century. At the same time, we have not always been so vigilant in our protection of civil liberties, and our fear-driven denials of the right of assembly mark some of the low points of our constitutional history. See, e.g., *Korematsu v. United States*; *Dennis v. United States*.

Notwithstanding our notable failures in cases like *Korematsu* and *Dennis*, we have for the most part sought to extend the right of assembly to favored and disfavored groups alike. Over the past few decades, some of our cases carved out an important exception to that view in denying group autonomy to segregationists who discriminated solely on the basis of race in the South. Most of these cases involved access to public goods or public accommodations that, because of the government imprimatur on them, did not involve a right to exclude from private activity. See, e.g., *Daniel v. Paul*. In a few instances, we extended this rationale to purely

private organizations like swimming pools and amusement parks. See, e.g., *Sullivan v. Little Hunting Park*; *Tilman v. Wheaton-Haven Recreation Ass'n*. Our decisions construed these private entities as within the reach of public accommodations statutes.

In hindsight, these decisions are best interpreted as remedial action taken to address the “badges and incidents of slavery” that have plagued much of our nation’s history. *Jones v. Alfred Mayer*. In my view, it is unwise to interpret these cases as representing a generalizable state action rationale that would further impinge upon the freedom of assembly. We are better off to heed Judge Friendly’s pragmatic counsel:

Whatever the true explanation for *Shelley v. Kraemer* . . . most people would say of it as Paul Freund is reputed to have said of *Brown v. Board of Education*, “can you imagine it having been decided the other way?” Even in this most sensitive area, however, not every state contact should suffice to bring down the constitutional axe.

Henry J. Friendly, “The Public-Private Penumbra—Fourteen Years Later,” *University of Pennsylvania Law Review* 130 (1982): 1292.

Widening the reaches of our antidiscrimination decisions beyond the confines of situations involving widespread and systematic mistreatment of African Americans would dilute the compelling reasons underlying those decisions. Extending these decisions would “utterly emasculate the distinction between private as distinguished from State conduct.” *Moose Lodge No. 107 v. Irvis*.

The majority likens gender discrimination in Minnesota to the experience of African Americans in the South during the 1960s and 1970s, reasoning that the “stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.” Ante, 625. I cannot agree with this comparison even in the rhetorical context in which it is offered. The conditions for African Americans in the South were uniquely evil in American history. Although our government’s historical treatment of other racial minorities, religious minorities, women, and homosexuals has been far from spotless, the conditions that these groups have faced in recent years have never approached the pervasive exclusions that African Americans encountered on a daily basis until legislative and judicial action demanded change. Surely the denial of the right to vote in a Jaycees election does not rise to the level of stigmatization of an African American denied access to facilities in his own neighborhood.

It might be objected about the case before us that a group of mostly white men is hard to construe as a dissenting interest. But political dissent is measured by a lack of political legitimacy, not a lack of social or economic power. In this case, the Jaycees's desire to exclude women from full membership in their organization cuts against societal norms and the dominant views of those holding political power. The Jaycees is in this sense a dissenting minority. That classification does not in itself imbue any positive or negative connotation to the group. At various times in our nation's history, communists, fascists, abolitionists, suffragists, and segregationists have all been dissenting minorities. Robust democratic principles recognize the importance of permitting these practices irrespective of whether we judge them to be morally commendable.

III.

The majority's creation of the category of "intimate association" builds on a decontextualized understanding of privacy that elevates certain forms of human relationships to a special protected status. In my view, we should be wary of creating a distinction of constitutional significance where one is unwarranted.

The majority's justification for intimate association stems from the relationship between privacy and association that we identified in *Griswold v. Connecticut*. But the kind of privacy underlying group autonomy facilitates public engagement by allowing unpopular groups to preserve their ability to engage in political life unrestrained by overt or covert social, political, or economic pressures. See *NAACP v. Alabama*. It does not aim to create an impenetrable and insulated private sphere. That sphere and the kinds of relationships that the majority asserts it protects with the category of intimate association are already encompassed by the right of privacy announced in *Griswold*. In fact, this Court has yet to encounter a case in which the putative right of intimate association would extend any protections beyond the right of privacy.

The regrettable collateral effect of creating an unnecessary right of intimate association is that it jettisons those groups that fail to meet its stringent contours to a lower level of constitutional protection. In the majority's words, "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which [intimate or expressive association] is at stake in a given case." Ante, 618. Indeed, the majority's restriction of intimate associations to those "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship," ante, 620, would preclude most if not all of the groups that have found refuge in the right of assembly throughout our nation's history. And all in service of a

vacuous distinction that provides no greater constitutional protection for any group.

The Jaycees is not a public group. It receives no government sponsorship or dollars. In this way, it exists in the “non-public” realm and is free to make membership decisions based on its own internal practices and values without complying with the societal norms or explanations that we demand from governmental activities. This freedom is not without consequences: it may be that the exclusionary practices of the Jaycees injure the self-respect, personal autonomy, or equality of opportunity of those excluded from their full ranks. That is true of all kinds of groups ranging from fraternities and sororities to athletic teams to musical symphonies. These groups exclude members based on gender, appearance, talent, and ability. Those excluded may experience the pain and stigma of rejection and may lose out on numerous relationships they would have otherwise formed had they not been rejected. These circumstances are regrettable but they are not for us to remedy through the coercive arm of the law.

IV.

The majority’s creation of a category of “expressive association” improperly construes the Jaycees as merely a means of expression and ignores that it is a form of expression in its very gathering and its selection of members. Justice O’Connor’s concurrence makes a similar error in dismissing the expressive aspects of the Jaycees.

We noted in *NAACP v. Alabama* that the “close nexus between the freedoms of speech and assembly” demonstrates that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” The very existence of the Jaycees is a form of expression, and the forced inclusion of unwanted members undeniably alters the content of that expression. As we stated in *Griswold v. Connecticut*, the related right of association “includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.” Joining is a method of expression. *Lathrop v. Donahue* (Douglas, J., dissenting). The same can be said of the right of assembly.

We observed in *Thomas v. Collins* that:

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance

their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction.

The reasoning expressed in *Thomas* is similar to our prior restraint doctrine for free speech. We recognize in that area that preventing a message altogether by restraining a speaker is as anathema to free speech as censoring that message after the fact and may send a “chilling effect” that discourages the speaker from even attempting to convey a message. The same is true with actions taken to constrain an assembly before its expression is manifest. A registration requirement chills assembly by forcing the members of a group to disclose their affiliation. *Thomas v. Collins*.

Similarly, forcing the exclusion of unwanted members on a group necessarily alters the “voice” of that group and censors expression before it can even be made. Justice O’Connor’s concurrence today aptly conveys this point: “[p]rotection of the association’s right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.” Ante, 633. And despite its blithe dismissal of the consequences to the Jaycees, the majority also recognizes the voice-altering nature of its decision:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Ante, 623. In a critical comment reflecting the significance of what is at stake today, the majority acknowledges that: “[a]ccording protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” Ante, 622.

Justice O’Connor’s concurrence proposes an alternative assessment based on the commercial nature of a group. She concludes that the Jaycees is “first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management” and that “Minnesota’s attempt to regulate the membership of the Jaycees chapters operating in that State presents a relatively easy case for application of the expressive-commercial dichotomy.” Ante, 639. I am

baffled as to how my esteemed colleague could reach such a conclusion on the record before us.

Justice O'Connor's classification is, however, illustrative of the dangers that arise when a court imposes its own interpretation of the meaning and purposes of a group or its practices. The record establishes that the Jaycees, like many similarly situated groups, is multifaceted in its purposes and activities. Each of its members will embrace certain values and activities more than others, and to some it may well be first and foremost a commercial organization. But we cannot state with any degree of certainty that the overall purposes, values, and activities of the Jaycees are primarily commercial in nature.

V.

In my view, the proper standard for determining the limits of group autonomy is through the right of assembly. We should first ask whether the Jaycees constitutes a nongovernmental, nonprofit, peaceable assembly. If so, we should make a strong presumption for the legitimacy of its claim to autonomy. Because the Jaycees clearly satisfies the threshold of peaceable assembly, this is for me an easy case to decide. I would affirm its constitutional right to peaceable assembly.

VI.

The minimal constraints of peaceable assembly leave us with racists, bigots, cultists, and ideologues. They also leave us with diversity. Peaceable assembly forces us to confront more honestly questions of what it means to live among dissenting, political, and expressive groups.

Because the Jaycees is an assembly unconnected to government sponsorship and is entitled under our precedent to protect its autonomy and message in the ways it deems desirable subject only to the constraint of peaceability, I respectfully dissent.

V. Theorizing Religious Assembly

An important implication of my argument for the dissenting, public, and expressive assembly is that meaning, purpose, and value cannot be imputed to a group by the state. For this reason, an understanding of assembly must itself be justifiable not only from the perspective of liberal constitutionalism but also from within the particular traditions that lay claim to it apart from the state. In other words, the boundary marked by assembly must be mutually acknowledged—assembly is sustained by arguments internal to the various traditions that enact it as well as by the government that permits it.¹

I have constructed a liberal constitutional approach to assembly in previous chapters. In this chapter, I turn to one alternative account: an Augustinian conception of how Christians might see assembly as part of the “earthly peace” that allows them to point toward the “heavenly peace.” My Augustinian account is both an *argument for* assembly and an *example of* the kind of particularized reasoning that can support a contingent democratic arrangement that recognizes a right of peaceable assembly. It is best seen as a contrast to the liberal constitutional account, but one that converges on the

¹For a similar perspective on a related issue, see Robert Cover’s description of the Mennonite understanding of the First Amendment in Cover, “Nomos and Narrative,” 28-29 (“[T]he Mennonites inhabit an ongoing *nomos* that must be marked off by a normative boundary from the realm of civil concern, just as the wielders of state power must establish their boundary with a religious community’s resistance and autonomy. Each group must accommodate in its own normative world the objective reality of the other.”). Cover elaborates: “From a secular perspective on the Constitution, the free exercise clause’s creation of small, dedicated, nomic refuges may appear to be merely an (unimportant) accommodation to religious autonomy. But for the Mennonites, the clause is the axis on which the wheel of history turns.” Ibid., 30 n.85.

same boundary. It will not encompass all claims to religious group autonomy or the free exercise of religion and, in fact, will fall short of persuading many Christians. But it reflects a theologically coherent understanding of assembly in the Augustinian tradition.

I begin by situating assembly within a discussion about religious group autonomy. The traditional view that religion occupies a special place in American political thought and constitutional law has come under fire in recent years. Claims to religious freedom have increasingly been resolved under an attenuated free exercise framework or treated as analogous to speech and association claims. I explore the weaknesses of these approaches and contend that assembly offers a more robust protection for religious group autonomy. My argument assumes that religious groups seek to live out of a competing political space rather than be absorbed into the unitary political space of the nation-state.²

A. THE SPECIAL PLACE OF RELIGION?

Questions of religious group autonomy have often received special attention in liberal political thought. Locke's *Letter Concerning Toleration*, one of the classic texts on freedom of association, focuses on the relationship between the church and government.³ Madison and Jefferson both addressed religious freedom and the role of churches in the new democracy.⁴ Following the recognition of the constitutional right of

²This is not true of all religious groups, but as I will argue below, it is consistent with some Christian theology.

³John Locke, *A Letter Concerning Toleration* (Indianapolis: Hackett, 1983).

⁴See James Madison, "Memorial and Remonstrance Against Religious Assessments" (1785); Thomas Jefferson, "The Virginia Act For Establishing Religious Freedom" (1786). See generally Steven Waldman, *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America* (New York: Random House, 2008).

association in *NAACP v. Alabama*,⁵ commentators devoted particular attention to religious associations.⁶

Contemporary theorists have also focused on the unique challenges posed by religious group autonomy. Nancy Rosenblum, whose work figures prominently in this area, argues that religious groups have “an exceptional constitutional status” and that “the internal life of religious associations, particularly its congruence with public norms or resistance to them, is the heart of the moral uses of pluralism.”⁷ Rosenblum is not alone in making these kinds of claims. In an important collection of essays on the freedom of association, Kent Greenawalt argues that “claims deriving from religious association will often have more force than those deriving from other associations.”⁸ Other recent considerations of religious group autonomy from within political theory include Jeff

⁵*NAACP v. Alabama*, 357 U.S. 449 (1958).

⁶See, e.g., Charles E. Rice, *Freedom of Association* (New York: New York University Press, 1962); Robert A. Horn, *Groups and the Constitution* (Stanford: Stanford University Press, 1956), 44-66; Glenn Abernathy, *The Right of Assembly and Association* (Columbia: University of South Carolina Press, 1961), 175-80.

⁷Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton: Princeton University Press, 1998), 73, 79. See also Nancy L. Rosenblum, ed. *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton: Princeton University Press, 2000).

⁸Kent Greenawalt, “Freedom of Association and Religious Association” in *Freedom of Association*, ed. Amy Gutmann (Princeton: Princeton University Press, 1998), 136.

Spinner Halev's *Surviving Diversity*,⁹ William Galston's *Liberal Pluralism*,¹⁰ and Lucas Swaine's *The Liberal Conscience*.¹¹

Despite the longstanding practice of according special consideration to religious groups, some scholars have recently argued that even if “religion” once occupied a privileged position in our nation’s history, that view is no longer tenable today.¹² These scholars suggest that religion should be treated indistinctly from other forms of expression and that religious groups should be treated the same as other groups. Three important developments have contributed to these arguments: (1) a weakening of the constitutional protections of the free exercise clause; (2) challenges to the definition of religion; and (3) the resolution of a growing number of religious freedom cases within the constitutional framework of speech and association.

1. Diminished Free Exercise

The well-known case of *Employment Division v. Smith* (which denied the free exercise claims of Native American spiritualists seeking to smoke peyote for religious

⁹Jeff Spinner-Halev, *Surviving Diversity: Religion and Democratic Citizenship* (Baltimore: Johns Hopkins Press, 2000).

¹⁰William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (New York: Cambridge University Press, 2002).

¹¹Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2006).

¹²See, e.g., Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York: Norton, 1996); Christopher L. Eisgruber and Lawrence G. Sager, “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct” *University of Chicago Law Review* 61 (1994): 1245. See also Marci Hamilton, *God vs. the Gavel: Religion and the Rule of Law* (New York: Cambridge University Press, 2005).

reasons) concluded that general laws of neutral applicability need only pass rational basis scrutiny to survive constitutional challenge under the free exercise clause.¹³ In announcing this standard, the Court reversed the course of modern free exercise cases that had applied strict scrutiny to laws affecting religious conduct.¹⁴ Justice Scalia's majority opinion reached back to the distinction between religious belief and religious action made in *Reynolds v. United States*, the 1878 decision that outlawed the Mormon practice of polygamy over a free exercise challenge.¹⁵ *Reynolds* had expressed the Jeffersonian idea that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."¹⁶ *Smith*'s revival of *Reynolds* opened the door to significant limitations on religious practice.¹⁷ Its doctrinal language also contributed to an increasingly unworkable constitutional framework for addressing matters of religious freedom.¹⁸

¹³*Employment Division v. Smith*, 494 U.S. 872 (1990).

¹⁴See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Smith* somewhat disingenuously attempted to distinguish these cases rather than overrule them. *Smith*, 881-82.

¹⁵*Reynolds v. United States*, 98 U.S. 145 (1878).

¹⁶*Ibid.*, 166. *Reynolds* drew the distinction between belief and action from Jefferson's letter to the Danbury Baptist Association. *Ibid.*, 164 (quoting Jefferson).

¹⁷The Court quashed Congress's attempt to rebut *Smith* when it ruled unconstitutional provisions of the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, in *City of Boerne v. Flores*, 521 U.S. 507 (1996). RFRA's federal provisions remain valid. See *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006). A number of post-*Smith* state legislative acts or constitutional amendments provide increased protections to religious freedom. See generally, Hamilton, *God vs. the Gavel*, 109.

¹⁸See, e.g., John Witte, *Religion and the American Constitutional Experiment*, 2nd ed. (Boulder: Westview Press, 2005), 3 (the "constitutional experiment" of religious liberty is "wandering, without any regular system of operations"); Mary Ann Glendon and Raul

2. The Meaning of “Religion”

A second reason for calls to treat religion as indistinguishable from other forms of expression centers on the definition of “religion.” The increasingly diverse forms of religious belief in the United States have led some to question whether the constitutional category of religion has an “essence” capable of coherent definition.¹⁹ These arguments typically refer to the Court’s brief foray into the definition of religion in two draft cases during the Vietnam era. In 1965, the Court noted in *United States v. Seeger* that religious belief was “based upon a power or a being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.”²⁰ Five years later, in *Welsh v. United States*, the Court upheld a religious exemption to the draft for a man whose objection to the war arose solely from his “reading in the fields of history and sociology.”²¹ The Court asserted that the statutory meaning of “religious” encompassed

F. Yanes, "Structural Free Exercise," *Michigan Law Review* 90 (1991): 478 (religion clause jurisprudence is “unprincipled, incoherent, and unworkable”); Vincent Phillip Muñoz, “Establishing Free Exercise” *First Things* 138 (2003): 14 (“If conservative and liberal church-state scholars agree on one thing, it is that the Supreme Court’s religious liberty jurisprudence is a disaster.”); Steven D. Smith, “The Rise and Fall of Religious Freedom in Constitutional Discourse,” *University of Pennsylvania Law Review* 140 (1991): 149-50 (“It is by now notorious that legal doctrines and judicial decisions in the area of religious freedom are in serious disarray.”).

¹⁹See George C. Freeman III, "The Misguided Search for the Constitutional Definition of 'Religion'" *Georgetown Law Journal* 71 (1983): 1519; Kent Greenawalt, “Religion as a Concept in Constitutional Law” *California Law Review* 72 (1984): 753. A related argument is that religious preferences cannot be distinguished from expensive tastes. See, e.g., Brian Barry, *Culture and Equality* (Cambridge: Harvard University Press, 2001).

²⁰*United States v. Seeger*, 380 U.S. 163 (1965).

²¹*Welsh v. United States*, 398 U.S. 333 (1970).

beliefs that “rest at all upon moral, ethical, or religious principles.”²² These broad statutory interpretations are not controlling constitutional definitions of religion, and the Court has to some degree backed away from them—in 1972, it distinguished Amish belief from Thoreau’s transcendentalism, nothing that “Thoreau’s choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.”²³ But the conceptual challenge to the meaning of “religion” remains, and reducing religion to a set of essences may be philosophically, if not constitutionally, problematic.²⁴

3. *Religious Speech and Association*

Diminished free exercise and questions over the definition of religion both challenge the notion that religious freedom should be given special protection in our constitutional framework. I have serious concerns about *Smith*’s approach to religious practice.²⁵ And I am not convinced that philosophical concerns about the “category” of religion preclude us from applying commonsense definitional boundaries.²⁶ But setting

²²*Ibid.*, 342-43.

²³*Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

²⁴Freeman writes that “[c]ourts simply cannot use ‘religion’ as a term of art without converting the right to the free exercise of religion into a seemingly illimitable right of personal autonomy. Freeman, “The Misguided Search for the Constitutional Definition of ‘Religion,’” 1564.

²⁵For critiques of *Smith* to which I am sympathetic, see Stanley Hauerwas and Michael Baxter, “The Kingship of Christ: Why Freedom of ‘Belief’ Is Not Enough,” *DePaul Law Review* 42 (1992); Michael W. McConnell, “Free Exercise Revisionism and the *Smith* Decision,” *University of Chicago Law Review* 57 (1990).

²⁶See, e.g., *United States v. Kuch*, 288 F.Supp. 439 (D.D.C. 1968) (rejecting the claim of an “ordained minister of the Neo-American Church” that her convictions for the sale and

aside these objections, I am even more wary of the compromise that has arisen through proposals to address religious freedom claims through the rights of speech and association.

These proposals can be traced to the Court's 1981 opinion in *Widmar v. Vincent*, which upheld on free speech principles access to a state university's facilities by a registered student religious group.²⁷ The Court noted that "religious worship and discussion" are "forms of speech and association protected by the First Amendment."²⁸ Since *Widmar*, the Court has increasingly decided religious freedom cases under these rights.²⁹ A number of legal scholars have also advocated this approach; as Steven Smith notes, "[p]roposals to collapse the commitment to religious freedom into other values such as freedom of speech, freedom of association, and equal protection have proliferated."³⁰ One recent example is Mark Tushnet's argument against the "redundant" free exercise clause.³¹ Tushnet analyzes the Court's free speech cases (including the Court's treatment of symbolic speech) and concludes that "[t]he Free Speech Clause, as

possession of marijuana and LSD violated her free exercise of religion); *Church of the Chosen People v. United States*, 548 F.Supp. 1247 (D.Minn. 1982) (rejecting free exercise challenge from organization whose primary doctrine was "The Gay Imperative").

²⁷*Widmar v. Vincent*, 454 U.S. 263 (1981).

²⁸*Ibid.*, 269.

²⁹See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1994); *Good News Club v. Milford Central School*, 538 U.S. 98 (2000).

³⁰Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 239 n.363.

³¹Mark Tushnet, "The Redundant Free Exercise Clause?" *Loyola University Chicago Law Journal* 33 (2001).

currently interpreted, provides protection for almost all of what the Free Exercise Clause, as currently interpreted, does.”³² He then suggests that most religious practices not falling within free speech fall within the right of expressive association.³³ Construing *Dale v. Boy Scouts of America*³⁴ as providing broad protections to expressive associations, Tushnet suggests that *Dale* “could support the development of constitutional prohibitions on a substantial range of state regulatory efforts that might not fall directly under the protection of the Free Speech Clause.”³⁵ He concludes that “[t]he free speech doctrine and the newly defined right of expressive association go a long way to providing an adequate substitute for the Free Exercise Clause.”³⁶ Tushnet believes that these alternative protections alleviate concerns that *Smith* “substantially reduce[d] the constitutional protection afforded religious belief and practice.”³⁷

Although I doubt that the Court’s free speech doctrine is as capacious as Tushnet wants it to be—the scope of what the Court *recognizes* as symbolic speech is far broader than the scope of what it actually *protects* with anything beyond rational basis scrutiny—I agree with his suggestion that some religious expression is protected by the freedom of

³²*Ibid.*, 83.

³³*Ibid.*, 84-86.

³⁴*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

³⁵Tushnet, “The Redundant Free Exercise Clause?,” 91. Tushnet offers as examples the use of peyote in religious ceremony, religiously motivated provision of sanctuary to refugees, religiously motivated objections to autopsies, and objections to local zoning ordinances or historic preservation rules.

³⁶*Ibid.*, 94.

³⁷*Ibid.*

speech.³⁸ But for reasons that should be apparent by now, I am not as optimistic that the freedom of association will adequately protect religious groups. My earlier arguments suggested that this right too often assumes consensus norms, privatizes and depoliticizes, and treats groups as merely instrumental to expression. More ominously, I argued in the last chapter that these characteristics of association all reflect forms of control by the state. Religious believers wary of state control will benefit from recovering a concept of assembly that offers stronger grounds for resistance to the state.

4. *The Alternative of Assembly*

I propose the right of assembly as a partial alternative to the options described above. Assembly sidesteps questions about the meaning of religion or whether religious practices are constitutionally privileged over nonreligious practices because it protects group autonomy generally without having to determine whether a group's practices are sufficiently religious in nature. At the same time, assembly falls outside of the doctrinal limitations of speech and association.

My argument for assembly bears some resemblance to Lucas Swaine's proposal to grant semisovereign (or quasi sovereign) status to "theocratic communities."³⁹ Swaine defines a theocratic community as "one in which persons endeavor to live according to

³⁸For examples of when the Court has recognized but not protected symbolic speech, see, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (Court assumes that "sleeping in the park" is expression covered by the First Amendment but upholds ban on overnight sleeping as a content neutral restriction); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) ("nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so").

³⁹Swaine, *The Liberal Conscience*, 72. Swaine uses "semisovereign" and "quasi-sovereign" interchangeably. *Ibid.*, 91. I dislike Swaine's term "theocrat" but use it in my discussion of his theory for purposes of clarity.

the dictates of a religious conception of the good that is strict and comprehensive in its range of teachings.”⁴⁰ He suggests that semisovereignty might offer “a significant measure of political or legal autonomy” and even that “[a] semisovereign body of community could be the ultimate recognized political authority within the territory that it occupies.”⁴¹ Swaine’s proposal advances some of what I am arguing for in the concept of assembly. But three aspects of his theory are problematic: (1) his binary categorization of theocrats; (2) the scope of semisovereignty; and (3) the ontology of semisovereignty.

My first concern is the most important to understanding the argument that comprises the bulk of this chapter. It objects to Swaine’s contention that “[t]heocrats in modern liberal democracies divide naturally into two different kinds.”⁴² The first, which he calls “ambitious theocrats,” are “enthusiastic participants in public life, engaging in public discourse and political affairs with a view to supplanting liberal institutions with stricter laws and regulations drawn from their religious conceptions of the good.”⁴³ The second, which he calls “retiring theocrats,” “withdraw from everyday affairs,” are “reluctant to participate in political or other public matters,” and work “to live instead in small communities where they may practice their religion in seclusion.”⁴⁴ Swaine’s dichotomy between ambitious and retiring theocrats is false. It is the kind of binary thinking about theologically informed politics that has frustrated Stanley Hauerwas for so

⁴⁰Ibid., 72.

⁴¹Ibid., 91.

⁴²Ibid., 9.

⁴³Ibid.

⁴⁴Ibid.

many years.⁴⁵ Hauerwas and similarly minded theologians are theocrats under Swaine's definition: they conceive of communities "in which persons endeavor to live according to the dictates of a religious conception of the good that is strict and comprehensive in its range of teachings."⁴⁶ But they seek neither to engage with legal institutions to impose their own religiously informed conception of the good nor to withdraw from society. They represent a category missing from Swaine's framework: the church that bears witness to the world in a dissenting, public, and expressive form.⁴⁷ This is the kind of assembly that I explore later in this chapter.

My second concern flows in part from the first. Swaine only extends his conception of semisovereignty to retiring theocrats.⁴⁸ He identifies three prerequisites for semisovereignty: (1) the religious community "must be virtually homogenous in its religious affiliations and have ownership of the property in the area to be made semisovereign"; (2) the "theocrats' territory must be distinct, free from and clear of

⁴⁵For a summary of repeated characterizations of Hauerwas as "sectarian," and Hauerwas's repeated denial of these characterizations, see Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004), 140-61.

⁴⁶Swaine, *The Liberal Conscience*, 72.

⁴⁷In sociological form, this group of religious believers comes closer to Jeff Spinner-Halev's definition of "religious moderates" (although they would eschew that label). According to Spinner-Halev, religious moderates "believe their religion is true, but are more willing to work and live among others than [religious] conservatives." They "seek to retreat to some exclusive social space on a regular basis, where outsiders are not welcome." And they "worry about their members straying from their particular path, but they also find that they can learn from others and that they want to be part of mainstream society in at least some ways." Spinner-Halev, *Surviving Diversity*, 10. I would qualify Spinner-Halev's definition by noting that this category of religious believers would welcome outsiders to observe their practices (although they may maintain membership requirements for some forms of participation in those practices).

⁴⁸Swaine, *The Liberal Conscience*, 74, 76, 158.

neighboring districts or communities”; and (3) the “community would have to provide a basic plan for its social institutions, showing the ability to take care of members’ basic needs and requirements.”⁴⁹ Hauerwas’s conception of the church would be unlikely to meet these conditions, but the political theory behind Swaine’s semisovereignty could be useful to Hauerwas’s kind of community as well as to those comprised of retiring theocrats.

My third problem with Swaine’s theory is ontological. Despite the promising potential of semisovereignty, Swaine retains a fundamental privileging of the state: theocratic communities are “subgroups within liberal polities” and “semisovereign bodies are subunits of larger polities, either ensconced within a polity or adjunct to it.”⁵⁰ The latter description bears parsing; the conjunctive “or” separates two very different ideas. A semisovereign that is “ensconced within a polity” is part of the whole that privileges the larger entity. In contrast, a semisovereign that is “adjunct to” a polity suggests proximity and relationship but does not imply subordination. This latter interpretation of semisovereignty is consistent with Augustine’s ontology. As William Cavanaugh notes, for Augustine, “[t]here is no sense that there is a single given public space in which the church must find its place.”⁵¹ Rather, the political space occupied by the earthly city is always epiphenomenal to the existence of the heavenly city. Moreover, even though

⁴⁹Ibid., 94-95.

⁵⁰Ibid., 76, 91.

⁵¹William Cavanaugh, “From One City to Two: Christian Reimagining of Political Space,” *Political Theology* 7 (2006): 310. Cavanaugh warns that “[w]hen the church is viewed as particular—as one of many in civil society—and the nation-state is viewed as universal—as the larger unifying reality—then it is inevitable that the one will absorb the many, in the putative interests of harmony and peace.” Ibid., 320.

“[t]he *City of God* is not a theoretical treatise aiming to clarify the nature of politics,”⁵² its theological and ontological claims about the two cities are not contingent on a particular political arrangement. Augustine’s theological commitments ground normative insights not only for the church of his time but also for the church in our time.

B. WHY AUGUSTINE?

I employ a distinctively Augustinian account of assembly out of commitments within Christian theology requiring the avoidance of general religious terminology. The eminent theologian Karl Barth lamented that “[t]he nineteenth century was certainly in error, when it understood the Church as a ‘religious society,’ a term taken over by jurisprudence.”⁵³ John Howard Yoder similarly questioned “whether the best way to talk about Christian faith is to put it within the wider category of ‘religion’ at all.”⁵⁴ Christian particularity means beginning with a people whose story is situated not within a specific state, government, or legal system but proceeds outside of these constructs in the life, death, and resurrection of Jesus Christ. It means that the practices of sharing, serving, proclaiming, and forgiving are undertaken in a framework that is both teleological and

⁵²Thomas W. Smith, “The Glory and Tragedy of Politics,” in *Augustine and Politics* ed. John Doody, Kevin L. Hughes, and Kim Paffenroth (Lanham: Lexington Books, 2005), 188.

⁵³Karl Barth, *The Faith of the Church: A Commentary on the Apostle's Creed According to Calvin's Catechism*, ed. Jean-Louis Leuba, trans. Gabriel Vahanian (New York: Meridian Books, 1958), 136.

⁵⁴John Howard Yoder, *The Priestly Kingdom: Social Ethics as Gospel* (Notre Dame, Ind.: Notre Dame Press, 1984), 182. As Stanley Hauerwas has written, the term “religion” is problematic because “it usually implies that the service and worship of God can be meaningfully discussed without specifying the identity of God, who God is, which god is being worshipped.” Hauerwas and Baxter, “The Kingship of Christ,” 110.

eschatological. It rejects the Lockean distinction between belief and action but agrees with Locke that “[t]he sprinkling of Water, and the use of Bread and Wine, are both in their own nature, and in the ordinary occasions of Life, altogether indifferent” but “in the Worship of God they wholly cease to be indifferent.”⁵⁵ It is possible that this kind of assembly will also be tenable to people of other faiths, but its theological plausibility will need to be justified in terms persuasive to them.⁵⁶ Augustine is also useful for encouraging interdisciplinary dialogue between theology and political theory. The *City of God* provides a common text and language from which to engage a diverse set of theological thinkers who have reflected upon the relationship between church and state and allows me to make a theological argument without addressing distinctions that would quickly become too specialized and too lengthy.⁵⁷ But my use of Augustine also works

⁵⁵Locke, *A Letter Concerning Toleration*, 40, 41. Cf. Cover, “Nomos and Narrative,” 8 (“There is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur, between banking a check and refusing to pay your income tax. In each case an act signifies something new and powerful when we understand that the act is in reference to a norm.”).

⁵⁶An example of an Islamic account that might envision religious practice as assembly is Saba Mahmood’s description of *da’wa*. Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press, 2005), 58 (The practice of *da’wa* in contemporary Egypt “encompasses a range of practical activities . . . includ[ing] establishing neighborhood mosques, social welfare organizations, Islamic educational institutions, and print presses, as well as urging fellow Muslims toward greater religious responsibility, either through preaching or personal conversation.”).

⁵⁷The theological voices I draw upon include John Milbank, Stanley Hauerwas, Kristen Deede Johnson, H. Jefferson Powell, Reinhard Hütter, William Cavanaugh, Rowan Williams, Bernd Wannenwetsch and Oliver O’Donovan. I recognize significant diversity in their views. Hauerwas stands out as the least “Augustinian,” but I think my rendering of assembly is (mostly) consistent with his thinking. My generalities and oversights may nevertheless leave theologically astute readers unsatisfied. My hope is that others with greater theological sophistication will be able to make better arguments in a language that can dialogue with political theory. I am aware that this challenge risks aligning theology with politics rather than the other way around. But there is also a danger in the other direction that traps theological arguments in a parochial grammar and vocabulary

in the other direction because he is widely recognized as a key figure within political theory.⁵⁸ His major writings rightfully retain a canonical place in political theory; his ideas influence not only subsequent Christian political thinkers like Aquinas, Luther, and Calvin but also theorists as diverse as Nietzsche, Wittgenstein, and Arendt. Unfortunately, much contemporary scholarship and teaching that reads Augustine through the lens of political theory ignores “the heart of Augustine’s account of the true worship of the crucified God and the charitable service of neighbor in collective *caritas*.”⁵⁹ Eric Gregory cautions against this approach: “[t]o understand Augustinian politics, it is not enough to relegate distinctively theological commitments as incidental to ‘religious’ or ‘philosophical’ views.”⁶⁰ Like Gregory, I believe the enterprise of political theory is better practiced with continued attention not only to Augustine but also to the

inaccessible to non-specialists. I think this is a mistake. To the extent that Christian theology can find common ground with democratic resources, theologians ought to be able to articulate their views in language that is not only faithful to their Christian commitments but also cognizant of and conversant with the particular history, jurisprudence, and political theory that they encounter in the United States.

⁵⁸It is for this reason that I have chosen Augustine’s *City of God* over Dietrich Bonhoeffer’s *Sanctorum Communio*. See Dietrich Bonhoeffer, *Sanctorum Communio: A Theological Study of the Sociology of the Church*, ed. Clifford J. Green, trans. Reinhard Krauss and Nancy Lukens, vol. 1, Dietrich Bonhoeffer Works (Minneapolis: Fortress Press, 1998). I am fairly convinced that Bonhoeffer’s early work provides an equally compelling (and perhaps more interesting) theological framework for my understanding of a Christian assembly. But because political theorists will be much more familiar with Augustine than Bonhoeffer, I leave a consideration of *Sanctorum Communio* for another context.

⁵⁹Eric Gregory, *Politics and the Order of Love: An Augustinian Ethic of Democratic Citizenship* (Chicago: University of Chicago Press, 2008), 379. Cf. *ibid.*, 33 (noting “the relative neglect of theology in academic political theory”).

⁶⁰*Ibid.*, 33-34. Gregory chides “political Augustinians who like to talk about religion but are not sure what to do with the particularity of Christian God talk.” *Ibid.*, 48.

theological framework that informs his writing. The account of the dissenting, public, and expressive assembly that follows is such an attempt.

C. AN AUGUSTINIAN ACCOUNT OF ASSEMBLY

1. The Dissenting Assembly

My first claim is that an Augustinian assembly is inherently dissenting. The justification for this assertion requires entering the complex relationship between the heavenly city and the earthly city that has repeatedly confounded Augustine's interpreters. Before I begin that journey, let me set forth my penultimate conclusions as a guide to where I am heading: (1) although the heavenly city and the earthly city do not map to "church" and "state," (2) the assembly is the sociological form of the heavenly city "on pilgrimage" *to the extent* that it bears witness to true peace and justice, and (3) the earthly city, which maintains an earthly peace through government, can never bear witness to true peace and justice but instead views earthly peace and justice as ultimate goods; therefore, (4) the properly oriented assembly dissents from the earthly city's orientation toward earthly goods. These conclusions do not mean that the dissenting assembly never supports institutions of government in the earthly city. To the contrary, it endorses the earthly peace because that peace facilitates its witness to the true heavenly peace. The dissenting assembly objects to the earthly city's orientation toward earthly goods, not to the goods themselves. Now to the work of explaining these contentions.

In Book XV of the *City of God*, Augustine famously distinguished the two cities by the objects of their love: the heavenly city pursues the love of God; the earthly city

pursues the love of self.⁶¹ This ontological distinction explains the need for Augustine's massive historiography in the preceding books. By constructing a history of the *saeculum*, he shows that the earthly city is fundamentally rooted in violence and self-love.⁶² Even the "bonds of peace" that foster unity in the earthly city are built upon bloodshed and violence.⁶³ The heavenly city, in contrast, proceeds from an ontology of peace rooted in a love of God. The two cities thus reflect "two contrasting codes."⁶⁴ But the heavenly city is not merely eschatological. The "city of the saints is above" but "here below it begets citizens, in whom it sojourns till the time of its reign arrives."⁶⁵ The heavenly city is "in a state of pilgrimage" and "sojourns on earth and lives by faith."⁶⁶ Its sociological form is the church, or what I am calling the assembly.⁶⁷

⁶¹*City of God*, Book XIV, c. 28.

⁶²Cf. John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Oxford: Blackwell, 1990), 390 ("Augustine's contrast between ontological antagonism and ontological peace is grounded in the contrasting historical narratives of the two cities."); *ibid.*, 391 ("Mythical beginnings of legal order are therefore traced back to the arbitrary limitation of violence by violence, to victory over rivals, and to the usurpation of fathers by sons.").

⁶³*City of God*, Book XIX, c. 7. Augustine writes: "how many great wars, how much slaughter and bloodshed, have provided this unity!" *Ibid.* Cf. Cavanaugh, "From One City to Two," 310 ("There is a unity in the earthly city, but it is a false unity, one based on the *libido dominandi*.").

⁶⁴Milbank, *Theology and Social Theory*, 405.

⁶⁵*City of God*, Book XV, c. 1.

⁶⁶*Ibid.*, Book XIX, c. 17. Cf. *ibid.*, Book XV, c. 21 ("the heavenly city, which sojourns on earth").

⁶⁷See *ibid.*, Book VIII, c. 24 ("the city of God, which is the holy Church"); *ibid.*, Book XIII, c. 16 ("the city of God, that is, His Church"). I emphasize the church as the *sociological* form of the heavenly city on pilgrimage because there are also members of the heavenly city who reside outside of the church.

Importantly, the sociological form of the heavenly city does not create a binary distinction between “church” and “state.”⁶⁸ There is no such clear separation in Augustine’s thought. To the contrary, Augustine recognized that Christian citizens share a “mortal life” that is “common to both cities.”⁶⁹ He writes of “the mortal course of the two cities, the heavenly and the earthly, which are mingled together from the beginning down to the end.”⁷⁰ Prior to the last judgment, this commingling permeates not only the institutions of the earthly city but also the church itself:

We must understand in one sense the kingdom of heaven in which exist together both he who breaks what he teaches and he who does it, the one being least, the other being great, and in another sense the kingdom of heaven into which only he who does what he teaches shall enter. Consequently, where both classes exist, it is the Church as it now is, but where only the one shall exist, it is the Church as it is destined to be when no wicked person shall be in her. Therefore the Church even now is the kingdom of Christ, and the kingdom of heaven. Accordingly, even now His saints reign with Him, though otherwise than as they shall reign hereafter; and yet, though the tares grow in the Church along with the wheat, they do not reign with Him.⁷¹

⁶⁸As Milbank notes, “[t]he *civitas terrena* is not regarded by [Augustine] as a ‘state’ in the modern sense of a sphere of sovereignty, preoccupied with the business of government.” Milbank, *Theology and Social Theory*, 406. Cf. Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, 2004), 113 (“In Augustine’s system the *civitas terrena* was not intended to represent in an exact way the political community any more than the *civitas dei* was synonymous with the Church”).

⁶⁹*City of God*, Book XIX, c. 17. Cf. *ibid.*, Book XV, c. 21 (both cities “starting from a common gate opened in Adam into this mortal state”).

⁷⁰*Ibid.*, Book XVIII c. 54. See also Book XIX c. 26 (“the two cities are commingled”).

⁷¹*Ibid.*, Book XX, c. 9. See also *ibid.* (“For to this beast belong not only the avowed enemies of the name of Christ and His most glorious city, but also the tares which are to be gathered out of His kingdom, the Church, in the end of the world.”). Cf. Gregory, *Politics and the Order of Love*, 129 (“The kingdom of God is much bigger than the church, and the church experiences the same sinful divisions and broken ruptures that characterize the world.”); John N. Figgis, *The Political Aspects of S. Augustine’s “City of God”* (New York: Longman’s, 1921), 52 (“Members of either body are found, and always will be found, in the terrene representative of the other.”).

How then do we explain the apparent paradox of a church that is both the heavenly city on pilgrimage and yet comprised of both good and wicked people? The answer, I think, lies in conceiving of the church as assembly. I agree with John Milbank against Robert Markus that while “Augustine is certainly at pains to stress that many true members of the city of God lie outside the bounds of the institutional Church, just as many of the baptized are not true members at all, this does not mean that he regards institutional adherence as a secondary and incidental matter.”⁷² Rather, it is through the collective practices of the church that the heavenly city manifests God’s peace and justice before an audience of the earthly city. What is not possible by the expression of individuals in the heavenly city (whether they reside inside or outside of the church) is made possible through the corporate expression of the church as assembly.

The key to the significance of assembly is highlighted by Augustine’s insistence that life in the heavenly city is inherently social. He writes:

[T]he life of the wise man must be social. . . . For how could the city of God (concerning which we are already writing no less than the nineteenth book of this work) either take a beginning or be developed, or attain its proper destiny, if the life of the saints were not a social life?⁷³

⁷²Milbank, *Theology and Social Theory*, 402. Markus’s important interpretation of Augustine’s political thought minimized the importance of a visible, sociological church. See Robert A. Markus, *Saeculum, History, and Society in the Theology of St. Augustine* (New York: Cambridge, 1970).

⁷³Ibid., Book XIX, c. 5. In the words of the British pluralist John Figgis, Augustine’s thought is “eminently social.” Figgis, *The Political Aspects of S. Augustine’s “City of God,”* 51.

Indeed, as Oliver O'Donovan suggests, "Augustine makes society central to the supreme good."⁷⁴ This social life consists of practices that point toward true peace and justice.

Chief among these is forgiveness. Augustine argues that "mutual forgiveness" is critical to "keep that peace without which no man can see the Lord."⁷⁵ He writes:

Our very righteousness, too, though true in so far as it has respect to the true good, is yet in this life of such a kind that it consists rather in the remission of sins than in the perfecting of virtues. Witness the prayer of the whole city of God in its pilgrim state, for it cries to God by the mouth of all its members, "Forgive us our debts as we forgive our debtors."⁷⁶

Milbank underscores the social and eschatological dimensions to Augustine's understanding of forgiveness:

[G]iven the persistence of the sin of others (as well as our own sinfulness, which we cannot all at once overcome, but remains alien to our better desires) there is only one way to respond to them which would not itself be sinful and domineering and that is to anticipate heaven, and act as if their sin was not there, by offering reconciliation.⁷⁷

Forgiveness and reconciliation are thus central practices to the church embodying the heavenly city. But as Bernd Wannenwetsch suggests, the church also reflects the heavenly city when it practices "the proclamation of the Word and the administration of the sacraments *in the proper way (recte)*—that is, in the promise of the Spirit."⁷⁸ These

⁷⁴Oliver O'Donovan, "The Political Thought of *City of God*" in Oliver O'Donovan and Joan Lockwood O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Grand Rapids: Eerdmans, 2004), 51.

⁷⁵*City of God*, Book XV, c. 6.

⁷⁶*Ibid.*, Book XIX, c. 27.

⁷⁷Milbank, *Theology and Social Theory*, 411. Cf. *ibid.* ("there is a way to act in a violent world which assumes the ontological priority of non-violence, and this way is called 'forgiveness of sins'").

⁷⁸Bernd Wannenwetsch, *Political Worship: Ethics for Christian Citizens* trans. Margaret Kohl (Oxford: Oxford University Press, 2004), 2.

practices are how “the Church can be understood as a divine institution.”⁷⁹ Yet the church is not synonymous with the heavenly city because, comprised as it is of good and wicked members, it will not always be what Hauerwas calls the “faithful manifestation of the peaceable kingdom in the world.”⁸⁰ Creating and maintaining a political space for the assembly is thus important for its capacity to reflect the heavenly city but does not in and of itself guarantee that reflection.⁸¹

Recognizing that the church commingles with the earthly city helps explain the church’s use of earthly goods. Augustine is clear that earthly goods are beneficial: “the things which this city desires cannot justly be said to be evil, for it is itself, in its own kind, better than all other human good.”⁸² Most significantly, the heavenly city and the earthly city share an “earthly peace,” which is “the temporal peace which the good and the wicked together enjoy.”⁸³ According to Augustine:

The earthly city, which does not live by faith, seeks an earthly peace, and the end it proposes, in the well-ordered concord of civic obedience and rule, is the combination of men’s wills to attain the things which are helpful to this life. The heavenly city, or rather the part of it which sojourns on earth and lives by faith, makes use of this peace only because it must, until this mortal condition which necessitates it shall pass away.⁸⁴

⁷⁹Ibid.

⁸⁰Stanley Hauerwas, *The Peaceable Kingdom: A Primer in Christian Ethics* (London: SCM Press, 1984), 99.

⁸¹This is an important qualifier given the historical record of the church’s use of violence and rejection of peace. Clearly, the church has not always been faithful in its witness to the heavenly city. But its empirical failings should not be read as a negation of Augustine’s ontological claim that the church in true form *is* the heavenly peace on earth.

⁸²*City of God*, Book XV, c. 4.

⁸³Ibid., Book XIX, c. 26.

⁸⁴Ibid., c. 17. Cf. *ibid.* (The heavenly city “while in its state of pilgrimage, avails itself of the peace of earth, and, so far as it can without injuring faith and godliness, desires and

As Oliver O'Donovan observes, this earthly peace is "not an institution but simply a condition of order."⁸⁵ Jean Bethke Elshtain suggests that Augustine's use of the earthly peace means that Christians "can use the political order because it introduces regularity into social relations and thus helps to make possible the life of the Church."⁸⁶ And H. Jefferson Powell notes similarly that an Augustinian "has good theological reasons to support the legal enforcement of certain individual rights as a strategy for protecting and promoting the temporal peace of American society."⁸⁷

Augustinian Christians, then, do not need to view liberal democracy as inherently bad but can instead capitalize on the freedom that it offers for proclamation and worship.

Karl Barth reached a similar conclusion in the particularly ominous context of 1938

Europe:

No direct action that the Church might take . . . could even remotely be compared with the positive relevance of that action whereby, without any interference with the sphere of the State, this Church proclaims the coming Kingdom of Christ. . . [T]he guarantee of the State by the Church is finally accomplished when the Church claims for itself the guarantee of the State, i.e., the guarantee of freedom to proclaim her message. This may sound strange, but this is the case: all that can be said from the standpoint of divine justification on the question (and the questions) of human law is

maintains a common agreement among men regarding the acquisition of the necessities of life, and makes this earthly peace bear upon the peace of heaven.").

⁸⁵O'Donovan, "The Political Thought of *City of God*."

⁸⁶Jean Bethke Elshtain, *Augustine and the Limits of Politics* (Notre Dame: University of Notre Dame Press, 1995), 21.

⁸⁷H. Jefferson Powell, "The Earthly Peace of the Liberal Republic" in *Christian Perspectives on Legal Thought* eds. Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella (New Haven: Yale University Press, 2001), 86.

summed up in this one statement: the Church *must have the freedom to proclaim divine justification*.⁸⁸

The church has a stake in preserving a space for worship and proclamation and can “use liberal politics along the way to enjoying the politics of an infinite God.”⁸⁹ That the United States has constitutionally enshrined a right of assembly is a good thing for the church, and challenging the government to honor that right is a project worth pursuing.⁹⁰

At the same time, the church is never fully at home in the earthly city. Its members commingle in the earthly city and make use of the earthly peace, but “however much they may support and encourage the ‘consensus of human wills in respect of resources for man’s mortal existence,’” they “are not members of the earthly city, too.”⁹¹ For Augustine, the heavenly city’s acceptance of the earthly peace is always conditioned upon its freedom to worship God:

This heavenly city, then, while it sojourns on earth, calls citizens out of all nations, and gathers together a society of pilgrims of all languages, not

⁸⁸Karl Barth, “Church and State,” in *Community, State, and Church: Three Essays* ed. Will Herberg (Garden City, N.Y.: Doubleday, 1960), 147. Cf. Stanley Hauerwas, *Performing the Faith: Bonhoeffer and the Practice of Nonviolence* (Grand Rapids: Brazos Press, 2004), 56 (“It has always been my conviction, a conviction I believed I learned from Barth, that the character of a society and state is to be judged by the willingness to have the gospel preached truthfully and freely.”).

⁸⁹Gregory, *Politics and the Order of Love*, 381. Gregory’s conception of an “Augustinian civic liberalism” emphasizes “the central role that love (of God and neighbor) can and should play in an Augustinian social vision.” *Ibid.*, 2.

⁹⁰In this regard, I am in agreement with a kind of “Augustinian civic liberalism” that differs from an antiliberal reading of Augustine. See *ibid.*, 12 (describing the antiliberal reading of Augustine as holding “a distaste for liberal political arrangements” and imagining “liberal democracy as morally and spiritually bankrupt, a social expression of theological heresies.”). Gregory includes both Hauerwas and Milbank in the antiliberal category. *Ibid.*, 2, 17.

⁹¹O’Donovan, “The Political Thought of *City of God*,” 58 (quoting *City of God*, Book XIX, c. 17).

scrupling about diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained, but recognising that, however various these are, they all tend to one and the same end of earthly peace. It therefore is so far from rescinding and abolishing these diversities, that it even preserves and adapts them, *so long only as no hindrance to the worship of the one supreme and true God is thus introduced.*⁹²

The Augustinian assembly recognizes the limitations of the earthly peace, and it endorses that peace only to the extent that it remains free to worship and to name the injustice of the earthly city.⁹³

For Augustine, both cities “alike either enjoy temporal good things, or are afflicted with temporal evils, but with diverse faith, diverse hope, and diverse love.”⁹⁴ As Markus elaborates:

The members of the two cities are distinguished according to the objects in which they seek their final satisfaction, that is to say those they wish to “enjoy” for their own sake, above all else, to the pursuit of which their other concerns are subordinated. The citizens of the heavenly city

⁹²*City of God*, Book XIX, c. 17 (emphasis added).

⁹³I recognize that my argument here relies upon a contested interpretation of Augustine’s understanding of the earthly peace and the church’s reliance upon the state’s coercion to maintain peace. Augustine endorses the church’s reliance on the state’s coercive power in the early sections of the *City of God*. And as Gregory notes, “[i]t is a sad fact that Augustine’s willingness to use political might to lovingly ‘correct’ religious opponents has frequently been pressed into the service of paternalist politics and love crusades of different kinds.” Gregory, *Politics and the Order of Love*, 16. But I am arguing from the more limited framework that Augustine establishes primarily in Book XIX. Importantly, I am not offering a defense of the internal coherence of the *City of God* (and, in particular, whether Augustine’s endorsement of coercion against heretics is superseded by his account of peace in Book XIX). Rather, I am using Augustine’s text as a starting point for a framework for assembly. Cf. *ibid.*, 10 (“[W]hat Augustine actually meant does not settle the normative question of what a modern Augustinian thinker . . . ought to believe about liberal democracy. On any point where Augustine’s statements prove unacceptable, incomplete, or ambiguous, his intellectual descendents are free to amend them; and the improved theory need not take the form of a revisionist account of what Augustine really meant or would have meant.”).

⁹⁴*City of God*, Book XVIII, c. 54.

recognise no object worth of such ultimate allegiance but God; the citizens of the earthy city prefer some lower good.⁹⁵

These differences are theological because misconceiving of proper ends and purposes converts goods into gods. Augustine sees this clearly. Because the heavenly city worships one God and the earthly city recognizes many gods, “it has come to pass that the two cities could not have common laws of religion.”⁹⁶ For this reason:

[T]he heavenly city has been *compelled in this matter to dissent*, and to become obnoxious to those who think differently, and to stand the brunt of their anger and hatred and persecutions.⁹⁷

Although Augustine directs his critique against Roman polytheism, it remains applicable in contemporary American society, which also recognizes many gods in its earthly goods. Powell brings this contemporary critique sharply into focus: “A society resting on liberal premises is literally incapable of engaging in true worship: any religious exercises under the auspices of a liberal government would necessarily be idolatrous and grounds for Christian dissent, not Christian approval.”⁹⁸ The orientation of government in the earthly city also explains why the efforts of some “ambitious theocrats” to baptize aspects of American government with religious language and symbolism are *theologically* misguided. As Powell writes:

[T]he professions of carefully “nonsectarian” religious belief that permeate American government—the national motto “In God We Trust,” the prayer at the opening of the legislature, the “God bless you” at the end

⁹⁵Markus, *Saeculum, History, and Society in the Theology of St. Augustine*, 67-68.

⁹⁶*City of God*, Book XIX, c. 17.

⁹⁷*Ibid.*, (emphasis added).

⁹⁸Powell, “The Earthly Peace of the Liberal Republic,” 91. Cf. Gregory, *Politics and the Order of Love*, 381 (“[I]n the precise Augustinian sense, the logic of modern culture does insist on perpetual enjoyment, even of liberal democracy.”).

of the official speech—ought to provoke Christian outrage. Rather than greeting these expressions of American “civic religion” with a kind of relief, as though they were a welcome reminder of some underlying equation of the United States and the biblical city on the hill, Christians should view them as objectionable, an attempt to manipulate public sentiment that is as cynical as it is essentially blasphemous. We need to educate politicians who are practicing Christians about their Christian duty not to engage in this type of profanity.⁹⁹

Because no earthly government can recognize the true purposes and limitations of earthly goods, an Augustinian assembly must always offer a dissenting voice flowing from its knowledge of the ultimate good. Thus, as Thomas Smith suggests, “Christian faith does more than supply a counternarrative to modernity” but also “imparts a wisdom about the wide horizon of human possibility that provides a standard for a countervailing critique of political practices, as well as a motive to push against those defects through loving service.”¹⁰⁰

2. *The Public Assembly*

The Augustinian distinction between the two cities means that the church, insofar as it reflects the heavenly city, exists as its own public and political space. For Augustine, the church’s public nature derives flows out of its reimagining of the relationship between *polis* and *oikos*:

Since, then, the house ought to be the beginning or element of the city, and every beginning bears reference to some end of its own kind, and every element to the integrity of the whole of which it is an element, it follows plainly enough that domestic concord of domestic obedience and domestic rule has a relation to the well-ordered concord of civic obedience and civic rule.¹⁰¹

⁹⁹Powell, “The Earthly Peace of the Liberal Republic,” 91.

¹⁰⁰Smith, “The Glory and Tragedy of Politics,” 204.

¹⁰¹*City of God*, Book XIX, c. 16.

Reinhard Hütter traces this redefinition of *polis* and *oikos* to the New Testament:

One way to show that the church is a public in its own right in distinction from the *polis* is to draw upon the ‘other’ of the ancient *polis*, namely the *oikos* or household. Ephesians 2:19 shows wonderfully how the church can be understood as something similar to a *polis* and to an *oikos*, though not identical with either one: ‘So then you are no longer strangers (*xenoi*) and aliens (*paroikoi*), but you are citizens (*sympolitai*) with the saints and also members of the household (*oikeioi*) of God.’ If we take this sentence in all its radicality, we have to conclude that the *ekklesia* explodes the framework of antique politics which is precisely built on the strict dichotomy between *polis* and *oikos*.¹⁰²

This “overcoming of the antinomy between *oikos* and *polis*”¹⁰³ creates a new form of public, and the church appears “as a reality that is neither *polis* nor *oikos*.”¹⁰⁴ Thus, as Hütter argues, the church is “a public in its own right” that is “a human ‘space’ which is constituted by binding teachings, principles, and norms; that makes possible a ‘coming together’ for action and interaction; and that creates a common identity and mutual accountability.”¹⁰⁵ The public assembly cannot be defined relative to the state but must possess its own public nature: “there is no public without clear visibility, without a defining and constituting set of binding convictions, rules, and key practices.”¹⁰⁶

¹⁰²Reinhard Hütter, “The Church as Public: Dogma, Practice, and the Holy Spirit” *Pro Ecclesia* 3 (1994): 354.

¹⁰³Milbank, *Theology and Social Theory*, 403.

¹⁰⁴William Cavanaugh, *Theopolitical Imagination* (New York: T&T Clark, 2002): 86.

¹⁰⁵Hütter “The Church as Public,” 336 and *ibid.*, n.7.

¹⁰⁶*Ibid.*, 349. Hütter’s recognition of the church as public flows from Arendt’s observation that any human space seeking to be public is constituted by defining walls. See Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 194-99.

But Augustine is even more subversive than simply insisting on a public space for the church. As Rowan Williams suggests, Augustine's argument is "designed to show that it is life outside the Christian community which fails to be truly public, authentically political."¹⁰⁷ William Cavanaugh elaborates that Augustine insists "that the Empire is not public at all because its practices are not oriented toward the worship of God."¹⁰⁸

Instead:

A true *res publica* is based on justice, which must include giving God his due sacrifice, for only when God is loved can there be love of others and a mutual acknowledgement of right. According to Augustine, the true public thing is thus constituted by the Eucharist, which offers true sacrifice to God and makes the Church into Christ's body.¹⁰⁹

For Augustine, the heavenly city is "social" and the earthly city is "private."¹¹⁰ The earthly city is ordered to a love of self and can be neither social nor a "public thing":

[W]here there is not this righteousness whereby the one supreme God rules the obedient city according to His grace, so that it sacrifices to none but Him, and whereby, in all the citizens of this obedient city, the soul consequently rules the body and reason the vices in the rightful order, so that, as the individual just man, so also the community and people of the just, live by faith, which works by love, that love whereby man loves God as He ought to be loved and his neighbour as himself—there, I say, there is not an assemblage associated by a common acknowledgment of right and by a community of interests.¹¹¹

¹⁰⁷Rowan Williams, "Politics and the Soul: A Reading of the *City of God*" *Milltown Studies* 19/20 (1987): 58.

¹⁰⁸Cavanaugh, *Theopolitical Imagination*: 90.

¹⁰⁹*Ibid.*

¹¹⁰Augustine, "The Literal Meaning of Genesis," Book XI, c. 15, quoted in Kristen Deede Johnson, *Theology, Political Theory, and Pluralism* (New York: Cambridge University Press, 2007), 161.

¹¹¹*City of God*, Book XIX, c. 23.

For Augustine, the church as the sociological form of the heavenly city is the true public that is also political. Because the church as public can never be privatized or depoliticized, it will always require an engagement with the government that rules the earthly city. Kristen Deede Johnson suggests that this Augustinian perspective may remedy liberalism's "problematic . . . failure to provide the space and the means for interactions between the different particularities that coincide in contemporary political society."¹¹² According to Johnson:

[The Augustinian] reminder of the one-time public nature of the Church can help us pause for a moment to remember that, by definition, "public" can refer to any community or group of people united by a common interest or good. It need not refer only to a nation or a state, or to the explicitly political realm of nations and states. This means, for example, that a people united by worship of God can be considered a public just as much as a people united by a common national allegiance. Throughout its history and tradition, Christianity has been conceived, by both its participants and its opponents, as communal, social, and public at its very core. It is only recently, under liberalism, that it has distanced itself from its communal embodiment to become more a matter of private faith and belief. Such a transformation has surely impacted not only Christianity but many other constituencies within western liberal societies who have reduced their communal claims in order to exist as "private" entities, coming together in the public realm of liberalism as almost anonymous entities.¹¹³

The church thus errs when it allows itself to be seen as either part of the state or as one of many associations relegated to a privatized civil society.¹¹⁴ In both of these cases, the

¹¹²Johnson, *Theology, Political Theory, and Pluralism*, 257. Johnson continues that: "Christians themselves have acquiesced to the definitions and parameters provided to them by liberalism. By allowing themselves to be positioned and trained by the language and practices of liberalism, they have lost the imaginative power to picture other possibilities that are rooted in the language and practices of Christianity." Ibid.

¹¹³Ibid., 257-58.

¹¹⁴Cavanaugh cautions that "[m]any attempts at salvaging the 'public' nature of Christianity proceed by carving out a space for the church in civil society, a supposed

church is positioned by other than its own theological framework. Wannenwetsch offers a corrective: “In its very existence as worshipping community, the Church stands for the limitation of state and society which these themselves cannot provide.”¹¹⁵

3. *The Expressive Assembly*

The final aspect of assembly that I wish to highlight through an Augustinian framework is the assembly as a form of expression rather than a means of expression. Unlike the first two characteristics I have discussed, this one isn’t explicit in Augustine’s theology or epistemology but is superimposed by reading him through the lenses of Wittgenstein, MacIntyre, and Hauerwas.¹¹⁶ But it is, I think, a philosophically coherent interpretation that flows out of an Augustinian account of assembly.¹¹⁷ Indeed, reading Augustine in this light exposes the *incoherence* of conceiving of the Augustinian assembly as an “expressive association” that is only instrumentally valuable to more

sphere of free participation that stands independent of the state.” Cavanaugh, *Theopolitical Imagination*, 6.

¹¹⁵Wannenwetsch, *Political Worship*, 245. Cf. Cavanaugh, “One City or Two,” 310.

¹¹⁶See Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (New York: Macmillan, 1953); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981). See also the various citations to Hauerwas in these notes. On the connections between Wittgenstein and Augustine, see Elshtain, *Augustine and the Limits of Politics*, 30-34. It is important to recognize the influence of these three thinkers on the argument that I am making. Christopher Insole helpfully cautions against the urge to construe Augustine’s heavenly city as a “set of practices or dramatic performances” and “thus crediting Augustine for anticipating the work of Alisdair MacIntyre and Stanley Hauerwas, with their interest in virtuous practices within tradition-guided frameworks.” Christopher J. Insole, “Discerning the Theopolitical: A Response to Cavanaugh’s Reimagining of Political Space,” *Political Theology* 7 (2006): 332-333.

¹¹⁷My description of the expressive assembly also bears some affinity with Augustine’s hermeneutics and epistemology in *On Christian Doctrine*.

primary modes of expression.¹¹⁸ The expressive message of the Augustinian assembly is found not only in the words it utters but also in its very act of gathering and the ways in which its members relate to one another, to outsiders, and to God.

We glimpse the inherent expressiveness of assembly in Augustine's discussion of sign (*signum*), thing (*res*), and sacrament (*sacramentum*). He writes in *On Christian Doctrine*:

All instruction is either about things or about signs; but things are learnt by means of signs. I now use the word "thing" in a strict sense, to signify that which is never employed as a sign of anything else: for example, wood, stone, cattle, and other things of that kind. Not, however, the wood which we read Moses cast into the bitter waters to make them sweet, nor the stone which Jacob used as a pillow, nor the ram which Abraham offered up instead of his son; for these, though they are things, are also signs of other things.¹¹⁹

Signs point to things. But not every sign is of equal importance:

[A]t the present time, after that the proof of our liberty has shone forth so clearly in the resurrection of our Lord, we are not oppressed with the heavy burden of attending even to those signs which we now understand, but our Lord Himself, and apostolic practice, have handed down to us a few rites in place of many, and these at once very easy to perform, most majestic in their significance, and most sacred in the observance; such, for example, as the sacrament of baptism, and the celebration of the body and blood of the Lord. And as soon as any one looks upon these observances he knows to what they refer, and so reveres them not in carnal bondage, but in spiritual freedom.¹²⁰

¹¹⁸ *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

¹¹⁹ Augustine, *On Christian Doctrine*, Book I, c. 2.2. Augustine continues: "There are signs of another kind, those which are never employed except as signs: for example, words. No one uses words except as signs of something else; and hence may be understood what I call signs: those things, to wit, which are used to indicate something else." Ibid.

¹²⁰ Augustine, *On Christian Doctrine*, Book III, c. 9.13.

The church is thus to be concerned first and foremost with “sacred signs,” or “visible sacraments.”¹²¹ Pier Franco Beatrice highlights the scope of *sacramentum* for Augustine:

Augustine uses *sacramentum* of such diverse cultic realities as baptism and Eucharist and the annual commemorations of the mysteries of Christ, that is, the feasts of the liturgical year. In general, he uses the word for all the rites connected with the instruction of the catechumens and *competentes*, as for example, the sign of the cross, the salt, the insufflations and exorcisms, the tunics of animal skin trodden as a sign of repentance, the bows of the head, the *traditio* of the creed and the Lord’s Prayer, the putting off of shoes and the donning of linen, and, furthermore, for the Easter octave of the neophytes, public or private penance, the laying on of hands, reconciliation, Lent, the Lord’s Prayer, and the marriage bond.¹²²

These sacraments constitute the very nature of the church. As Emmanuel Cutrone suggests, for Augustine “[t]he body of Christ is one with the church, and to that extent the sacraments are signs of, and one with, the church.”¹²³ Indeed, Augustine writes in *Against Faustus*: “[T]here can be no religious society, whether the religion be true or false, without some sacrament or visible symbol to serve as a bond of union. The importance of these sacraments cannot be overstated, and only scoffers will treat them lightly.”¹²⁴

¹²¹ Augustine, *City of God*, Book 10, c. 5. Markus notes the significance of Augustine’s “definition of *sacramentum* in terms of *signum*.” Robert A. Markus, “St. Augustine on Signs,” *Phronesis* 2 (1957): 60.

¹²² Pier Franco Beatrice, “Christian Worship,” in *Augustine Through the Ages: An Encyclopedia*, eds. Allan Fitzgerald and John C. Cavadini (Grand Rapids: Eerdmans, 1999), 158. Beatrice continues that: “Augustine also uses *sacramentum* to refer to parables, biblical figures, the mystical meaning of numbers, the typologies of the Old Testament, and, in short, all the mysteries hidden beneath a sacral exterior, every externally perceptible reality whose true meaning is known to faith.” Ibid.

¹²³ Emmanuel J. Cutrone, “Sacraments,” in *Augustine through the Ages*, 745. Cf. *ibid.*, 743 (“It is not possible to separate Christ from the church and the sacraments, because both the church and the sacraments come from Christ.”).

¹²⁴ Augustine, *Against Faustus*, Book 19, c. 11, quoted in *ibid.*, 741.

The centrality of sacrament to the church's expression means that a "political dimension" is "embedded in the quite normal give and take of activity in congregational worship."¹²⁵ In Hauerwas's well-known phrase, "the church does not have, but rather is, a social ethic."¹²⁶ The practices of the church convey more about its message than foundationalist appeals to doctrine. As Wannenwetsch elaborates, these practices are an ongoing activity:

The fact that the practice is bound to repetition makes it impossible to identify a foundational claim that is somehow derived from its essence; for the knowledge of such an essence would actually make the constitutive character of the Church's worship superfluous, this constitutive character being the fact that men and women have to *attend and participate in it again and again*, so as to practise at the proper place what Barth calls "the art of correct asking about God's will."¹²⁷

This means that ethics must "spring from" worship, and worship is "in the fullest sense *a form of life*."¹²⁸ As Augustine writes in *The City of God*: "This is the sacrifice of Christians: we, being many, are one body in Christ. And this is also the sacrifice which the Church continually celebrates in the sacrament of the altar, known to the faithful, in which she teaches that she herself is offered in the offering she makes to God."¹²⁹ The

¹²⁵Wannenwetsch, *Political Worship*, 8.

¹²⁶Stanley Hauerwas, *Truthfulness and Tragedy* (Notre Dame: Notre Dame University Press, 1977), 143.

¹²⁷Wannenwetsch, *Political Worship*, 3. Cf. *ibid.* ("The practical experience of worship continually impresses on the Church that it cannot simply 'possess' its own ethic, in the sense that it could also apply that ethic to an external field of action, as something it 'has' and over which it can dispose. Its ethical knowledge will always be available to it only in the mode of 'being', embodied in its own praxis. And the exemplary mode of this incorporation is simply the complex celebration of worship, which integrates the different aspects of living.").

¹²⁸*Ibid.*, 2, 5.

¹²⁹Augustine, *City of God*, Book X, c. 6.

sacraments of the church are signs pointing to Christ, and in this way the church's political life is always a form of theological expression.

D. RELIGIOUS PRACTICE AND CONSTITUTIONAL ASSEMBLY

Having sketched a theological framework for the dissenting, public, and expressive assembly, I turn now to considering some of its implications in American constitutional law. The boundary formed by my Augustinian account of the dissenting, public, and expressive assembly matches the boundary that I have justified in previous chapters from a liberal constitutional perspective. In other words, I believe that Christian practices understood in the Augustinian sense that I have described can flourish within the constitutional framework of assembly.¹³⁰ I turn now to some of the practical effects of that framework.

The strong presumption in favor of group autonomy that I articulated in the last chapter would protect the membership, hiring, educational, and worship practices of groups. This view of assembly extends beyond the strictures of Augustinian Christianity to endorse the Court's decisions permitting the Mormons to terminate the employment of a building engineer not in good standing with their church¹³¹ and the Amish to disregard compulsory school attendance laws in the interests of protecting their children from

¹³⁰Moreover, it can do so without needing to rely on an "institution-sensitive doctrine" that distinguishes between groups like churches and the Boy Scouts. For an institution-sensitive approach, see Richard W. Garnett, "Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?" *St. John's Journal of Legal Commentary* 22 (2007): 515-33.

¹³¹*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

worldly influences.¹³² Conversely, this kind of assembly challenges the Court's curtailment of peaceable but unpopular activities like Mormon polygamy¹³³ and the use of peyote in Native American religious ceremonies.¹³⁴

At the same time, an Augustinian conception of assembly does not provide a comprehensive solution to the problems plaguing the First Amendment's religion clause jurisprudence. Its focus on the internal practices of groups manifesting a political form apart from the state has little to say about concerns raised by Swaine's ambitious theocrats. Arguments for a return of prayer in public schools, the posting of the Ten Commandments in courtrooms, the display of nativity scenes on public property, or the inclusion of creation science in educational curricula will find no refuge in the right of assembly—they fall beyond the questions of group autonomy encompassed by assembly. Nor does assembly resolve claims about wholly individualistic religious beliefs (perhaps akin to the kind of transcendentalism to which the Court alluded in *Yoder*) that have nothing to do with the shared practices of a group.

Finally, although a more nuanced concept of assembly might provide guidance for cases involving the use or denial of public funds or resources, the assembly that I have sketched here does not address those situations. It does not resolve questions of “equal access” to public property or funding.¹³⁵ Nor does it answer questions of entitlement to

¹³²*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹³³*Reynolds v. United States*, 98 U.S. 145 (1878).

¹³⁴*Employment Division v. Smith*, 494 U.S. 872 (1990).

¹³⁵See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (showing of Christian film on school grounds after normal school hours); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1994) (use of general student funds by student-run Christian publication); *Good News Club v. Milford Central School*, 538

unemployment benefits or tax exemptions.¹³⁶ It may be that some or all of these matters can appeal to other aspects of the First Amendment, but they lie beyond the concern of the right of assembly.

The case that comes closest to the line that I have drawn with assembly is *City of Boerne v. Flores*, in which the Court intimated that the City's denial of a permit to St. Peter Catholic Church to enlarge its building within a designated "historic district" was subject only to rational basis scrutiny.¹³⁷ The extent to which the denial of the building permit would have infringed upon the assembly of the church is not clear to me from the Court's opinion. But it is possible that limiting the scope of the church's private property would restrict religious expression in a way qualitatively different than the denial of access to public funds or resources.

It is apparent, then, that my Augustinian conception of assembly is limited in scope and will not satisfy all religious adherents. I have only gestured at how and why the framework of the dissenting, public, and expressive assembly might help sharpen debates within and among political theory and theological politics. Yet it may be the case that assembly offers a possibility that is neither political liberalism nor theocratic hegemony.

U.S. 98 (2000) (use of public school facilities for Christian instruction after normal school hours).

¹³⁶See *Sherbert v. Verner*, 374 U.S. 398 (1963) (addressing entitlement to unemployment benefits by Seventh Day Adventist who refused to work on Saturdays); *Bob Jones University v. United States*, 461 U.S. 574 (1983) (upholding denial of tax exemption to private educational institutions with religiously based racially discriminatory policies).

¹³⁷*City of Boerne v. Flores*, 521 U.S. 507 (1997).

Conclusion

The preceding pages have traced the history of the constitutional protections accorded to groups, beginning with the freedom of assembly in the Bill of Rights and culminating with what I have characterized as a weak right of association that emerged in the middle of the twentieth century. The declension narrative that I have offered is not easily explained. If, as one commentator has suggested, “an association is merely an assembly dispersed over time and space,”¹³⁸ then it would seem that the constitutional protections of groups would only have grown with an increased focus on the right of association. But assembly and association are concepts shaped by particular frameworks and histories. I have argued that the history of assembly in the United States recognizes the political character of the dissenting, public, and expressive group. Association, in contrast, has lost sight of these attributes by drawing upon shifting justifications during its development over the past fifty years: first a pluralism that emphasized consensus and stability, then the penumbras of the First Amendment that linked association to privacy, and, most recently, a tenuous elevation of intimacy over expressivism. The result has been a highly malleable doctrine that arbitrarily extends constitutional protection to some groups and denies it to others, thus weakening the indispensable liberal value of group autonomy, which in robust form provides one of the most effective limits to state power.

¹³⁸C. Edwin Baker, “Scope of the First Amendment Freedom of Speech,” *UCLA Law Review* 25 (1978): 1032.

One way to challenge the current state of affairs is to return to the concept of assembly. The right of assembly—at least as it was originally conceived in the early part of our nation’s history—protects the members of a group based not upon their principles or politics but simply by virtue of their coming together in an alternative way of life.¹³⁹ By itself, of course, this definition is as flimsy as that of association. Because the state determines the kinds of practices that are “inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means,” the interests of the state always trump the right of assembly.¹⁴⁰ But an emphasis on the right of assembly and the kinds of unpopular, renegade, and even dangerous gatherings that have sought refuge in that right reminds us of the importance of resisting all but the rarest of encroachments upon an assembled people. This caution is obscured in the shifting theoretical and jurisprudential justifications of association, which have too easily permitted incursions into group autonomy.

¹³⁹The growth of online social networks like *Facebook* and *MySpace* raises important sociological and philosophical questions about what it means to be part of a group. There is in the virtual world more diversity, fluidity, and expression than ever before. But whether this virtual space falls within the auspices of constitutional protection remains to be seen. As the virtual world becomes graphically and interactively more “life-like,” the relationships that we form “in-world” (to borrow a term from the burgeoning online game, *Second Life*) raise new questions about the nature of groups and the protections that should be extended to them (questions like what constitutes membership in an online group, what counts as exit or renunciation of membership, and when virtual group activities transgress the boundaries of permissible conduct).

¹⁴⁰*Whitney v. California*, 371. Even Brandeis’s response to the *Whitney* majority acknowledged this reality. He wrote that “[t]he fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression,” but he intimated that restraints will be warranted when there is “the probability of serious injury to the State.” *Ibid.*, 378.

One eminently practical way to challenge the weakened right of association is to raise the freedom of assembly as an independent constitutional claim in First Amendment litigation. Rather than relying solely on the freedom of association or an ambiguous conglomeration of other First Amendment freedoms, future litigants in appropriate cases might argue in the alternative the right of peaceable assembly. Although it is possible that courts would conclude that the freedom of assembly is an antiquated precursor to the freedom of association,¹⁴¹ it would be unprecedented for a judicially constructed right completely to subsume an a right enumerated in the text of the Constitution. Moreover, the Court's previous decisions maintain an ambiguous link between assembly and association that falls short of equating the two concepts. On the other hand, if courts were expressly to recognize the continued importance of the freedom of assembly, then they would need to craft a doctrinal framework and outline the relationship of assembly to other First Amendment freedoms.

My argument for an express recognition of assembly does not come without a price. It calls into question the doctrinal soundness of the Warren Court decisions that shut down the racial discrimination of private organizations, decisions whose results are now almost universally regarded as morally commendable. It weakens *Roberts*, a consequence that many would view as unhealthy to a liberal society. But what is at stake in the right of people to express together in both word and action beliefs and views that differ from those held by the state is the autonomy from the state that liberalism ostensibly defends. This is the case even when those views are morally repugnant to or

¹⁴¹Cf. Rische, "Freedom of Assembly," 317 ("To refer to [association] as a new freedom would be amiss for it is only a further development of the freedom of assembly so plainly stated in the first amendment.").

threaten a liberal democratic vision. By losing touch with our past recognition of the freedom of assembly and the groups that have embodied it, we risk embracing too easily an attenuated right of association that cedes to the state control over what kinds of groups are acceptable in the democratic experiment. Democracy and stability may be easier in the short-term, but in forgetting the freedom of assembly, we forget the kind of politics that has brought us this far.

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